JD(SF)-20-18
Tempe, AZ, Denver, CO,
Oakland and San Diego, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

PURPLE COMMUNICATIONS, INC. and its Successor and Joint Employer CSDVRS, LLC d/b/a ZVRS

and

PACIFIC MEDIA WORKERS GUILD, LOCAL 39521, THE NEWSPAPER GUILD, COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO

Cases 21-CA-149635
28-CA-179794
21-CA-182016
32-CA-185337
21-CA-185343
27-CA-185377
27-CA-186448
28-CA-186509
21-CA-187642
28-CA-192041
27-CA-192084
28-CA-197009
27-CA-197062

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(Akin Gump Strauss Hauer & Feld LLP),
for the Respondent.

Martin Yost, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case over the course of 16 days between July 13 and October 3, 2017, in Phoenix, Arizona, Denver, Colorado, and San Diego, California. This case was tried following the issuance of an Order further consolidating cases, third consolidated complaint, and notice of hearing (the complaint) by the Regional Director for Region 28 of the National Labor Relations Board on June 19, 2017. The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by Charging Party Pacific Media Workers Guild, Local 39521, The Newspaper Guild, Communications Workers of America, AFL–CIO (Charging Party or the Union). The General Counsel alleges that Purple Communications, Inc. (Purple) and its successor and joint employer, CSDVRS, LLC (CSDVRS) violated Sections 8(a)(5), (3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act). Purple and CSDVRS (collectively referred to herein as Respondent) admit to constituting a joint employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices alleged against it.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs.[1] Post-hearing briefs were filed by the General Counsel and Respondent, and each of these briefs has been carefully considered. Accordingly, based upon the entire record herein, including the post-hearing briefs and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges that Purple, a corporation with a principal place of business in Rocklin, California, is engaged in the business of providing interpreting services for the deaf and hard of hearing. The complaint alleges and Purple admits that it annually performs services in excess of $50,000 in States other than California. CSDVRS, a corporation with a principal place of business in Clearwater, Florida, purchased Purple's business in February 2017, and continued to operate it in basically unchanged form thereafter. Accordingly, I find that Purple and CSDVRS are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I additionally find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's post-hearing brief and "R. Br." for Respondent's post-hearing brief.

II. FACTUAL BACKGROUND[2]

This case involves alleged unlawful conduct by Respondent following the execution of an initial collective-bargaining agreement with Charging Party, the recently certified bargaining representative for a unit of video interpreters or "VIs" at four of its locations.[3]

A. Respondent's operations

Respondent provides American Sign Language interpreting services for the deaf and hard-of-hearing communities. Its services include Video Relay Service (VRS) interpreting, which involves VIs translating between Respondent's clients and hearing persons via video conference throughout Respondent's (approximately) 19 call centers nationwide. Respondent employs both full-time and part-time VIs (referred to as "flex" VIs). Respondent also provides community interpreting, which, as the name suggests, involves interpreting in various community settings, such as public announcements, theater performances and court room interpreting. While Respondent employs individuals who solely perform community interpreting (known as "community interpreters"), it also assigns community interpreting work to VIs and outside contractors. (Tr. 1177–1183, 1195–1197)

During the time period relevant to this decision, Respondent's chief executive officer (CEO) was Bob Rae, who was supported by an upper management team that includes Vice President of Operations Francine Cummings, Regional Director of Operations Greg Camp and Associate Director of Operations Kim Surrency. Reporting to Surrency is Respondent's Operations Manager Jennifer Stambaugh (Stambaugh), who is charged with overseeing the four unionized call centers. (Tr. 1177, 1249–1250, 2183–2186, 2339)

Each call center is supervised by a center manager who reports to Stambaugh. During the relevant period, Cheryl Jonagan, followed by Sonoma Fragassi, served as center manager for Tempe. In San Diego, the position was held by Brad Godfrey, followed by Kristill Brown, Terra Thrasher, and then Henrik Ek, who currently holds the position. Dora Veith fills the role in Denver, where she is supported by Kelly Leo, who holds the title of center supervisor. (Tr. 441–443, 666, 1121–1122, 1240, 1465–1466, 1718, 1896, 1956, 2075)

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[2] I have based my credibility resolutions on consideration of a number of factors, including but not necessarily limited to, inherent interests and demeanor of witnesses, corroboration of testimony and consistency with admitted or established facts, inherent probabilities, and reasonable inferences that may be drawn from a record as a whole. Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony. *Hill & Dales Gen. Hosp.*, 360 NLRB 611, 615 (2014); *Daikishi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed Appx. 516 (D.C. Cir. 2003). I also recognize that the testimony of current employees may be deemed as particularly reliable when their testimony contradicts that of their supervisors, because such witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995); *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978). Finally, I have also taken into account the effects of the passage of time on memory, given that a good deal of the testimony in this case took place several months after the events in question.

[3] At various points throughout the record, the transcript contains references to "BI" instead of "VI"; the record is hereby corrected in that regard.

Christy McBee is Respondent's customer experience manager; as such, she is responsible for investigating and responding to customer complaints about individual VIs. Respondent's human resources function is headed by Sarah Haraz, who carries the title of human resources business partner. (Tr. 187, 2186)

B. The Union's certification and the parties' collective-bargaining negotiations

Beginning in 2012, the Union held an organizing campaign at several of Respondent's call centers; the following year, elections were held at call centers located in six locations. Eligible to vote were VIs, but not community interpreters. The Union was voted the exclusive bargaining representative for four units (in Denver, Colorado, Tempe, Arizona, Oakland, California and San Diego, California), each consisting of full-time and flex VIs, and was certified as such in December 2012. The Certification of Representative issued by the Board for each of the units identifies it as consisting of "full-time and flex VIs" and makes no mention of community interpreters. (Tr. 1178, 1361–1362, 2592–2593; Jt. Exhs. 1, 32) I will generally refer to the union-represented employees at the four locations as the "unit employees."

Over a 2-year period beginning in March 2013, the parties bargained a master collective-bargaining agreement (the CBA) covering the unit employees. In defense of numerous allegations, Respondent argues that it is not obligated to bargain over the terms and conditions of unit employees when they perform community interpreting work (alternately referred to as "community work"). Accordingly, a discussion of the parties' collective-bargaining history is appropriate. During the negotiations, the parties were aware that unit members were performing community interpreting work, and that certain of them (those hired pre-2010) received a wage differential for doing so. Early in the negotiations in September 2013, Respondent's chief negotiator asked the Union's chief negotiator point blank "if community assignments are covered work," to which he responded, "yes." At no time during the negotiations did any management representative challenge this characterization. (Tr. 1178, 1195, 1211–1222, 1373–1374, 2445–2453, 2583, 2594, 2622–2623; Jt. Exh. 1; GC Exh. 107)

At least one time during bargaining, the Union expressed concern about how the contractual language would impact the performance of community work by unit employees.[4] When the parties began to negotiate economic issues, the Union submitted a package proposal including a proposed 10 percent pay differential for "community assignments." Respondent's negotiator responded by referring to the "current practice" of paying a community differential for certain employees (i.e., those hired pre-2010). The following month, Respondent rejected the Union's proposed differential for all employees. In August, the Union abandoned that demand, but instead proposed that Respondent pay "other differentials as currently paid." The final, executed agreement contains no such language. However, after the contract became effective, pre-2010

[4] Specifically, the Union's negotiator sought assurance that one of Respondent's proposals (to offer unit employees overtime waivers) might operate to reduce the amount of community interpreting they were assigned. In a June 2013 proposal, the Union addressed this concern with language providing that unit employees would not be assigned "community hours" based on whether they signed overtime waivers. The record is unclear as to how Respondent specifically responded to this proposal, but it does not appear in the final, executed contract. (GC Exh. 107, 110; Jt. Exh. 1)

hires continued to receive the differential when they performed community interpreting. (R. Exh. 10, 11, 12; GC Exh. 109; Jt. Exh. 1; Tr. 2626–2627)

C. The initial collective-bargaining agreement and "unit work"

The CBA's recognition clause does not define the bargaining unit in terms of the scope of work performed, but rather states that Respondent recognizes a unit of "full-time and flex Video Interpreters" at each of the four unionized call centers. While it sets forth specific terms of employment for the performance of video-relay interpretation (VRS) work (such as scheduling and pay differentials), it makes no mention of corresponding terms for community interpreting. Thus, when unit employees perform community work, they are subject to terms and conditions (such as a scheduling protocol, emergency pay, travel pay and mileage reimbursement) that are mentioned nowhere in the contract. (Tr. 1198, 1200) That said, other portions of the CBA apply expressly to "all work" performed by unit employees. These portions include the contract's article on overtime, as well as its dues check off provision, which is discussed in more detail infra.

The CBA also contains the following work exclusivity language:

> 1.2 Except as outlined in Section 1.3, below, performance of the following, whether by presently or normally used processes or equipment or by new or modified processes or equipment, shall be assigned only to employees covered by this contract:
>
> a. The kind of work either normally or presently performed within the unit covered by this contract,
>
> b. Any kind of work similar in skill, and performing similar functions, as the kind of work either normally or presently performed in said unit, and,
>
> c. Any other kind of work regularly assigned to be performed within said unit.
>
> 1.3 Excluded employees may perform the work described in Section 1.2 above when volume exceeds expectations, to provide training and other support where needed, for testing new processes, and for other similar reasons that are beyond normal operations.

(Jt. Exh. 1)

D. Additional collective-bargaining agreement provisions relevant to this proceeding

The contract as executed (see Jt. Exh. 1) provides for final and binding arbitration of grievances arising under it, and contains a number of additional provisions relevant to this case:

1. "Union staff representatives" versus "Union stewards"

The contract recognizes two categories of individuals who may act on behalf of the Union: (a) "Union representatives" (also referred to as "Union staff representatives"); and (b) "employee representatives" (also referred to as "Union stewards"). The contract contains only one provision addressing the former, "representative" category, article 24. It states:

> Article 24 - Union Representative
>
> Union staff representative(s) shall be allowed reasonable access to non-production areas of call centers covered by this Agreement after coordinating with the Call Center Manager. Said representatives must follow all federally mandated rules and procedures. If it becomes necessary for the staff representative to discuss Union business with a member of the bargaining unit at the Company's facility, the representative may do so after first getting approval of the Call Center Manager or his/her designee. Such approval shall not be unreasonably withheld; provided, however, any such discussion shall be on non-work time and shall not cause any disruption of work of either the employee with whom the discussion is to be held or any other employee.

Martin Yost (Yost), who is also a flex VI at Respondent's San Diego call center, is the Union's sole staff representative responsible for representing the unit employees. (Tr. 2578, 2590–2591)

"Stewards," by contrast, are mentioned in several portions of the contract. In addition to being mentioned in the contract's *Weingarten* provision, their use of union time during certain meetings is addressed in another article, discussed infra.

2. Management-rights clause

The contract also contains a management-rights clause, which grants Respondent the sole and exclusive right, inter alia, to:

- direct the work force, establish schedules of operations, and determine staffing patterns and levels and the number of employees needed;

- manage and control its departments, buildings, facilities, equipment and operations…discontinue work for business, economic, or operational reasons;

- establish work standards, demote, suspend, discipline and discharge employees, determine the quality of customer services, and maintain the discipline and efficiency of its employees; and

- specify or assign work requirements and overtime, assign work and decide which employees are qualified to perform such work, and determine working hours, shift assignments, and days off.

3. Union entitlement to written discipline documents

The contract provides that Respondent must provide copies of "any criticism, commendation, appraisal or rating of such employee's performance in the employee's job or any other comment or notation regarding the employee's performance discipline issued to unit employees within one week of it being placed in the employee's personnel file." (Jt. Exh. 1 at 8; Tr. 2685)

Finally, the contract does not contain any provision susceptible to interpretation as a "zipper clause," i.e., one whereby the parties waive the right to bargain, during the term of the contract, over mandatory subjects not addressed in the contract and not raised during bargaining.

E. Respondent's Electronic Communications Policy and The Board's 2015 Purple Communications email decision

Since June 19, 2012, Respondent has maintained a policy in its nationwide handbook whereby employees are prohibited from using Respondent's email system to, inter alia, "engag[e] in activities on behalf of organizations or persons with no professional or business affiliation with the Company." (See Jt. Exh. 24 at 30; GC Exh. 2 at 30) The Board ruled on this policy, which I will refer to as the Electronic Communications Policy, four years ago. See *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 14 (2014) (*Purple I*). In that case, the Board took occasion to partially overrule *Register Guard*, 351 NLRB 1110 (2007), finding that employees who are granted access to their employer's email system have a presumptive right to access that email system during nonworking time, unless the employer can demonstrate the existence of "special circumstances necessary to maintain production or discipline." Id.

The *Purple I* Board remanded the proceeding to Administrative Law Judge Paul Bogas for the purpose of allowing the parties to introduce evidence relevant to a determination of the lawfulness of the policy under the new standard. Respondent chose not to introduce additional evidence of "special circumstances" justifying its policy and represented that it would not attempt to rebut the new presumption. Subsequently, Judge Bogas issued a Supplemental Decision, finding that, in the absence of demonstrated special circumstances, the Electronic Communications Policy violated Section 8(a)(1). On exceptions, the Respondent conceded that it had not shown special circumstances justifying its policy but contended that *Purple I*, to the extent it partially overruled *Register Guard*, had been wrongly decided. On March 24, 2017, the Board rejected this position, affirmed Judge Bogas' supplemental decision and ordered that Respondent rescind the Electronic Communications Policy. See *Purple Communications*, 365 NLRB No. 50 (2017). Respondent's appeal of this decision is currently before the Court of

Appeals for the Ninth Circuit. See *NLRB v. Purple Communications, Inc.*, Case Nos. 17–70948, 17–71062 and 17–71276 (9th Cir. Oct. 2, 2017).

III. ANALYSIS OF INDIVIDUAL ALLEGATIONS

The General Counsel alleges that, following the unit employees' selection of the Union as their bargaining representative, Respondent engaged in numerous actions in violation of Sections 8(a)(5), (3) and (1). The General Counsel alleges that Respondent increased discipline based on customer complaints, subjected employees to unwarranted investigation, and denied an employee contractually guaranteed union time. Respondent is also accused of engaging in several unilateral changes, including implementing new work rules, ceasing the deduction of dues for certain unit work and ceasing payment of an established wage differential. The General Counsel further alleges that Respondent failed to respond to multiple information requests and engaged in numerous independent 8(a)(1) allegations, including making threats, interrogating unit members, engaging in surveillance, violating *Weingarten* rights and promulgating, maintaining, and enforcing multiple unlawful rules.

To summarize my findings, I have that found the following complaint paragraphs and subparagraphs were sustained and should be remedied: 5(a), 5(b), 5(c), 5(d), 5(e), 5(g), 5(i), 5(j), 5(l), 5(m), 5(n), 5(o), 5(p), 5(q), 5(r), 5(s), 5(t)(3)(i), 5(u), 5(v), 5(w), 5(x)(2), 5(x)(3), 5(x)(4) to the extent it alleges the statement, "meetings must take place off the VRS floor," 5(x)(5) through (7), 5(y)(3) through (5), 5(y)(7), 5(y)(8), 5(z)(1), 5(aa), 5(cc), 5(ee), 5(hh); 6(f); 7(n), 7(p)(1) through (3), 7(p)(5) though (8), 7(p)(7), 7(q), 7(r), 7(t), 7(w); 8(a) and 8(d).

I have found the following complaint paragraphs and subparagraphs were not sustained and should be dismissed: 5(f), 5(h), 5(k), 5(t)(3)(ii), 5(t)(3)(iii), 5(y)(1), 5(y)(2), 5(y)(6), 5(y)(9), 5(bb), 5(dd), 5(gg), 5(ii), 5(jj), 5(kk), 5(ll),[5] 6(c), 6(j), 7(p)(4) and 7(s).

Finally, I have found complaint paragraph 8(b) should be deferred to the parties' grievance and arbitration procedure set forth in their collective-bargaining agreement.[6] An analysis of each allegation follows:

A. The parties' April 1, 2015 email "messaging" following execution of the CBA

Shortly following the parties' execution of their first collective-bargaining agreement, both Respondent and the Union took to Respondent's email system to broadcast their respective positions on the contract. Respondent's position was announced by CEO Rae, who sent two company-wide emails, each of which is alleged by the General Counsel to have violated the Act. Rae did not testify.

[5] Contrary to Respondent's assertions, I agree with the General Counsel that the allegations set forth in its September 25, 2017 Notice of Intent to Amend Complaint (¶ 5(ii), ¶ 5(jj), ¶ 5(kk) and ¶ 5(ll)) were fairly and fully litigated during the hearing. General Counsel's motion to amend is therefore granted.

[6] The allegations contained in the following complaint paragraphs were resolved by a pre-hearing, non-Board settlement between Respondent and the Union: 6(a), 6(b), 7(o), 7(u), 7(v), 7(x), 7(y), 7(z), 7(aa), 7(dd), 7(jj), 7(kk), 7(mm), 7(nn), 7(oo), 7(pp), 7(qq), 7(rr), and 8(c).

1. CEO email about union dues and other "risks and hazards of unionization" [¶ 5(c)]

a. Facts

On or about March 23, 2015, Respondent's then-Chief Executive Officer Bob Rae (Rae) emailed Respondent's VI workforce (including both represented and nonrepresented employees) stating, in part:

> As you may have heard, interpreters who voted to become members of the CWA Union have ratified the contract that was reached after two years of bargaining. Needless to say, the bargaining process was long and arduous, but one that we believe was marked by a respectful attitude on both sides.
>
> The contract is for a two year period and, we believe, preserves the best interests of the Company. Essentially, it keeps the bargaining unit interpreters on par with our interpreters in all other call centers, which was one of the Company's objectives in bargaining. There have been some adjustments in our operational practices to include KPIs; adjustments which the Company was previously considering in any event. Subsequently, these changes will be simultaneously implemented in all non-bargaining centers.
>
> While we respect the right of all employees to choose, we continue to believe that our employees who have chosen not to unionize have received the better deal because they get what the unionized employees will receive but will not be required to pay dues or take on the other risks and hazards of unionization.

(Jt. Exh. 72) On April 1, 2015, Yost and VI-stewards Michelle Caplette (Caplette) and Mary Jane Moore (Moore), sent an email to all VIs nationwide, including those in unrepresented call centers, touting the Union's victory in bargaining a contract. (Tr. 2635; Jt. Exh. 63) Later that day, Rae emailed the workforce again, stating:

> As stated in my email on March 24th, we have reached agreement with the CWA union and now have a contract in place that offers substantially the same as what all of our employees in non-unionized centers currently receive without having to pay dues. The few differences that were not in place in the non-unionized centers will be rolled out.

(Jt. Exh. 73)

b. Analysis

The General Counsel alleges that Rae's company-wide emails constituted an unlawful threat of futility, as well as a promise of benefits to employee who refrained from electing union representation. I agree.

Section 8(a)(1) of the Act provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]." Well-established Board precedent directs an 8(a)(1) violation where an employer's conduct "may reasonably be said to have a tendency to interfere with the free exercise of employee rights." *Unbelievable, Inc.*, 321 NLRB 815 (1997). This objective standard does not depend on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Rather, whether the statements are coercive is viewed from the objective standpoint of a reasonable employee, over whom the employer has a measure of economic power. See *Mesker Door, Inc.*, 357 NLRB 591, 595 (2011).

When an employer suggests that its employees' organizing efforts and the possible selection of the Union as their collective-bargaining representative would be an exercise in futility, the Act is violated. *Atlas Microfilming*, 267 NLRB 682, 685–686 (1983). Typically, statements of futility take the form of an employer asserting that, even were a union designated as employees' bargaining representative, the employer would "never" agree to a contract. See, e.g., id. However, the Board has also held that an employer also conveys the futility of selecting a bargaining representative by suggesting that the unrepresented portion of its workforce that they will share in any benefits secured by the union for employees at its unionized facilities. See *American Telecommunications Corporation,* 249 NLRB 1135 (1980) (unlawful to inform employees that employer made a practice of spreading benefits equally and therefore selecting a union would mean paying dues for nothing in return). Likewise, informing employees that they would receive all the benefits of a union contract without a union constitutes a promise of benefits made for the purpose of coercing employees to abstain from union organizing efforts. Id.

Certainly, however, not all employer statements about the benefits of unionizing are considered de facto unlawful. Employers' right to free speech is explicitly granted by Section 8(c) of the Act, and the Board has explicitly found that an employer may lawfully present its employees with a comparison of "benefits presently in effect" at its non-unionized versus unionized work sites, as long as those communications take place "in a manner and setting free from coercion." *Globe Shopping City*, 203 NLRB 177, 181 (1973); see also *Dlubak Corp.*, 307 NLRB 1138, 1151 (1992) ("an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit"). The key question is whether the employer's comparison of current unionized versus non-unionized terms and conditions of employment involves "misrepresentation, threats, or promises relating to existing or prospective benefits or terms of employment." *Globe Shopping City*, supra. In this regard, Respondent argues that Rae's statements were simply his lawful attempts to respond to the Union's misstatements about wages provided to non-union employees and clarification that Respondent "had already decided to provide non-union centers employment terms it gave to the Union in bargaining." (R. Br. at 130)

Based on the above-cited Board authority, I disagree with Respondent and find that Rae's company-wide emails, read together, constituted an unlawful promise of benefits and also amounted to an unlawful statement of futility.

First, I find that Rae's communications constituted a promise of benefits made for the purpose of coercing employees into rejecting the union as their bargaining representative. Rae did not limit his remarks to a permissible comparison of *current* benefits enjoyed at union versus non-union centers; he explicitly promised to "roll out" at its non-union centers any benefits "not in place" that the Union had obtained in bargaining. In the context of his repeated reference to unrepresented VIs enjoying such benefits without paying union dues, this clearly amounted to a promise that all of its employees—including those at call centers where the union had been rejected—would receive the benefits of the recently negotiated contract without paying dues. This unlawful promise of benefits, per the Board law discussed supra, removed Rae's statements from the protection of Section 8(c).

I additionally find that Rae's emails constituted an unlawful statement of futility. The emails sent an unmistakable message: employees at the recently unionized call centers had been duped into paying dues and gotten nothing more than they would have without union representation. In fact, he indicated, they had only managed—after 2 years of bargaining—to remain "on par" with their non-union colleagues. In other words, they had frittered away their union dues for nothing more than subjecting themselves to unspecified "risks and hazards" as represented employees. Any reasonable employee reading these emails would understand those who had exercised their Section 7 right to vote for union representation had done so in vain. Moreover, unrepresented VIs would reasonably conclude that refraining from organizing activity would allow them to enjoy pay, benefits and working conditions pegged to those of their represented counterparts without facing any risk, hazard or dues obligation.

Accordingly, I find that Respondent, by Rae, violated Section 8(a)(1) of the Act as alleged in ¶ 5(c) of the complaint.

2. Management invokes its Electronic Communications Policy [¶ 5(a), ¶ 5(b), ¶ 5(ee)]

At hearing, the parties stipulated that, since at least October 6, 2014, Respondent has continued to maintain its Electronic Communications Policy, which the Board found unlawful in 2017. See *Purple Communications*, 365 NLRB No. 50 (2017). By identical emails on April 1, center managers in San Diego and Tempe responded to Yost and Moore's company-wide emails announcing the Union's success in obtaining a first contract, invoked this policy. By doing so, the General Counsel alleges, these managers applied the rule in a discriminatory fashion against employee-stewards.

a. Facts

On April 1, 2015, Respondent's San Diego center manager, Brad Godfrey (Godfrey) emailed Yost as follows:

> I understand you are using our email system to communicate with employees in all our call centers regarding unionization. That is in violation of our Company policy that limits email use for business purposes only. It is important that you stop using our email for this

> purpose. As you know you can use your personal email to communicate with employees on their personal email with regards to these matters.

On the same day, Tempe Center Manager Jonagan sent an identical email to VI-steward Moore, who worked as a VI at that call center. The record indicates that, notwithstanding its continued maintenance of the Electronic Communications Policy, Respondent has allowed employees to use its email system for non-work, non-union business, including organizing potlucks and charity fundraising drives. (Jt. Exh. 68, 69, 70; GC Exh. 14, 37; Tr. 638)

b. Analysis

As a preliminary matter, I find that Respondent continued to violate the Act by maintaining its Electronic Communications Policy in the face of a Board order to rescind it, and that Godfrey and Jonagan's pronouncements, to the extent that they constitute an application of that policy, are likewise unlawful.[7] In this regard, Respondent argues that the Board erred by overturning *Register Guard.* This is an argument for the Board, not me, to consider; I am bound to follow Board decisions that have not been reversed by the Board or the Supreme Court. See *Pathmark Stores*, 342 NLRB 378, 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Ass'n*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).[8]

Regardless of how the Electronic Communications Policy fares under the new standard, I find that violates the Act because, under the facts of this case, it was applied to restrict the exercise of Section 7 rights—specifically, the right of union stewards to broadcast their success in recent contract negotiations. See *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). It is well settled that even a facially valid rule may be unlawful when enforced in a discriminatory manner. *Lawson Co.*, 267 NLRB 463 (1983); *Hammary Mfg. Corp.*, 265 NLRB 57 (1982); *St. Vincent's Hosp.*, 265 NLRB 38 (1982). Accordingly, I find that, by continuing to maintain the Electronic Communications Policy and applying it to restrict union stewards from communicating regarding "unionization," Respondent violated the Act as alleged in ¶ 5(a), ¶ 5(b) and ¶ 5(ee) of the complaint.

[7] I note that the Godfrey and Jonagan emails are unlawful in their own right and without any reference to the underlying policy, in that they explicitly ban protected conduct. *Lutheran Heritage*, 343 NLRB 646 (2004).

[8] While I recognize that the Board in its recent decision, *The Boeing Company*, 365 NLRB No. 154, slip op. (2017), indicated that it intends to evaluate future rules such as the Electronic Communications Policy under its new, balancing test (discussed infra), the fact remains that I am bound to follow its explicit determination regarding the policy in *Purple Communications*, 365 NLRB No. 50 (2017), which the Board has yet to overrule.

3. The Union's April 1 announcement and Human Resources' response [¶ 5(d)]

a. Facts

On April 1, 2015, Yost responded to Godfrey's directive to the San Diego VI's regarding personal use of email. In an email sent to Godfrey and Respondent's then-VP of Human Resources, Tanya Monette (Monette), he stated that the union was "in the process" of sending an additional email to the workforce in response to Rae's March 23/April 1 emails regarding the parties' initial contract. Yost also stated that he intended to inform Respondent's workforce, as a whole, that the contract covering union-represented VIs was effective beginning that day. He ended the email as follows:

> I wasn't aware there is a company policy that limits the use of email for business purposes only—I thought that policy was found to be unlawful in a recent Board decision. I also don't remember bargaining any terms of email use in our labor agreement.
>
> Can you please send me a copy of the policy you are referring to and please include the date it was implemented.

Godfrey deferred to Monette, who responded by emailing Yost a copy of Respondent's employee handbook and referring him to the Electronic Communications Policy. She further stated, "[f]rom my understanding our case is still being reviewed and currently open therefore our policy is still in effect." (Jt. Exh. 69, 70)

b. Analysis

The General Counsel alleges that, by her email, Monette violated Section 8(a)(1) of the Act by selectively enforcing Respondent's Electronic Communications Policy against union-related emails. I agree. As discussed, supra, an employer violates the Act by enforcing a work rule in a discriminatory manner (see cases cited, supra); Monette selectively applied Respondent's policy to Yost's announced email, which would have communicated a pro-union message to Respondent's workforce. Accordingly, I find that Respondent violated the Act as alleged in ¶ 5(d) of the complaint.

B. Treatment of community pay differentials following contract execution [¶ 8(a)]

According to the General Counsel, in March 2016,[9] Respondent violated Section 8(a)(5) by unilaterally ceasing to pay a wage differential for community interpreting work performed by certain unit employees. Respondent does not deny having changed its practice, but asserts that it was permitted to make this change, because community interpreting work is "not unit work," and alternately, because the Union waived its right to bargain over the rate of pay for such work.

[9] Unless otherwise noted, all dates hereafter refer to 2016.

1. Facts

As noted supra, Respondent employs extra-unit individuals, known as community interpreters, whose job is to perform community interpreting; in addition, Respondent has historically assigned community work to the VIs now represented by the Union. It is undisputed that, until 2010, Respondent paid VIs a differential for performing such work. That year, Respondent implemented a single pay rate, but grandfathered its current VIs. For at least 4 years, these employees were able to retain their dual rates, even if they transitioned their work status (i.e., from full-time to flex or vice versa). However, at some time thereafter, Respondent began removing the dual rates of grandfathered employees when they changed their status.[10] Thereafter, full-time VIs hired before 2010 who changed their status lost their differential for the community work they performed. The Union first learned of this change in March 2016, when VI Karen Boyle transitioned from full time to flex and lost her community differential. The Union filed a grievance, but was informed by Haraz that, because the grievance concerned community work, it was not subject to the CBA's grievance procedure. (Tr. 554, 1085–1086, 1195–1197, 2111–2113, 2459–2464, 2578–2579, 2584; GC Exh. 48, 88, 89; Jt. Exh. 99)

2. Analysis

Section 8(a)(5) and 8(d) define the duty to bargain collectively, which requires an employer "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). Thus, an employer may not change the terms and conditions of employment of represented employees, including pay differentials, without providing their representative with prior notice and an opportunity to bargain over such changes. See id. at 747; *Northwest Graphics, Inc.*, 342 NLRB 1288 (2004). A violation of Section 8(a)(5) does not require a finding of bad faith. *NLRB v. Katz*, 369 U.S. at 743 and 747.[11]

As a preliminary matter, I reject Respondent's contention that "community work" is not, and has never been, unit work and that therefore, Respondent is free to unilaterally change unit employees' terms and conditions of employment insofar as they relate to its performance. The Board certifications— as echoed in the master contract—define the bargaining unit by reference to the VI job title alone; however, at the time of certification and recognition, VIs were known to perform community interpreting work. After negotiations, during which the Union characterized community work as unit work with no disagreement expressed by Respondent, the parties agreed

[10] This change appears to have occurred at some point after September 1, 2014, when steward Yost retained his differential despite stepping down from full-time to flex status. (Tr. 2584–2585; GC Exh. 106)

[11] An unlawful unilateral change "frustrates the objectives of Section 8(a)(5)," because such a change "'minimizes the influence of organized bargaining' and emphasizes to the employees 'that there is no necessity for a collective bargaining agent.'" *Pleasantview Nursing Home v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003) (quoting *Katz*, supra at 744, and *Loral Defense Systems-Akron v. NLRB,* 200 F.3d 436, 449 (6th Cir. 1999)); *Mercy Hosp. of Buffalo*, 311 NLRB 869, 873 (1993).

that the contract's dues deduction and overtime articles would apply to "all work" performed by VIs.[12]

Nor do I find compelling Respondent's argument based on the contract's work exclusivity provision. Respondent argues that, because Sections 1.2 and 1.3 of the agreement place restrictions on the performance of certain work performed by unit employees (restrictions the parties do not observe, in practice, to apply to community work), it follow that community work must not be "unit work." This is a false equivalence: simply because the parties do not treat community interpreting work as meeting the contract's standard for *exclusive* unit work does not remove it from the wider category of unit work. As such, I find that Respondent has recognized and is obligated to bargain over all work performed by its VIs, and reject its attempt to exclude certain of that work from the scope of its bargaining obligation. See *Glades Electric Cooperative, Inc.*, 366 NLRB No. 112, slip op. at 1, fn. 1, 12 (2018).

That the parties chose not to include certain specific terms and conditions applicable only to community work does not change this result. In such circumstances, in the absence of zipper clause whereby the parties clearly and unmistakably agree not to bargain over issues not addressed by the contract during its pendency, the fact that they elected not to include language addressing the performance of community work, does not, as Respondent suggests, remove that subject from the scope of the bargaining obligation. See *Michigan Bell Telephone Co.*, 306 NLRB 281, 282 (1992) (in absence of an effective zipper clause, each party has the right, and the opposing party has the duty, to bargain about subjects not covered by the contract or otherwise waived in contract negotiations).

Respondent next argues that it was privileged to cease paying unit employees a differential for community work because the Union waived its right to bargain over this matter in particular. It is certainly true that an employer's otherwise unlawful change will be deemed valid conduct where it is shown that the union has waived its right to bargain over this matter. However, it is equally true that "[n]ational labor policy disfavors waivers of statutory rights by a union" and thus, they are not to be "lightly inferred." *C&P Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982); *Georgia Power Co.*, 325 NLRB 420, 420 (1998). Thus, while the obligation to bargain "may be waived by the Union either by the terms of a collective-bargaining agreement or by conduct…the waiver must be clear and unmistakable." *Harley-Davidson Motor Company*, 366 NLRB No. 121, slip op. at 2 (2018) (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). To meet this standard, the Board requires either that a contract clause include specific waiver language, or that the matter claimed to have been waived be shown to have been fully discussed by the parties and that the union consciously yielded its interest in the matter. *Allison Corp.*, 330 NLRB 1363, 1365 (2000).

In this case, the contract contains no language explicitly waiving unit employees' right to a community differential in the event of a change in work status. Nor does Respondent contend that the parties fully discussed this specific issue. Instead, Respondent urges that its rejection of the Union's proposed wage differential for all community work acted to waive the Union's right

[12] To the extent Respondent's brief suggests that its negotiator informed the Union that he considered its community work-related proposals "as permissive subjects of bargaining," this is simply not borne out by the record.

to bargain over this subject. I cannot agree. As a preliminary matter, the proposal Respondent rejected would have done significantly more than guarantee a community differential for grandfathered employees who transitioned their work status—the Union wanted *all* unit employees to be paid the differential, something that had not been done in several years. Moreover, Respondent's rejection of this proposal was explicitly couched in an assurance that it would continue with its "current practice" of paying a community differential for grandfathered employees. Significantly, Respondent carried through on this assurance (at least initially) after the contract became effective, when "grandfathered" unit members continued to receive the differential even after changing their work status. Nothing in this sequence of events suggests that the Union clearly and unmistakably waived this term, and I therefore reject Respondent's argument.

Accordingly, I find that, in March 2016, Respondent violated Section 8(a)(5) by ceasing to allow employees hired before 2010 to retain their differential for community interpreting work after their work status changed from full-time to "flex," as alleged in ¶ 8(a) of the complaint.

C. Deduction of union dues for community interpreting work [¶ 8(d)]

In May 2016, Respondent admittedly ceased deducting dues for amounts earned by unit employees for performing community interpreting work. The General Counsel alleges that, by doing so, Respondent violated Section 8(d) of the Act. I agree.

1. Facts

As noted, supra, the parties' contract contains a standard dues deduction provision, whereby Respondent agrees to deduct dues from the "earnings" of employees who authorize such deductions. The contract recites the following stipulated language of an employee's assignment:

> I hereby assign to the Pacific Media Workers Guild, The NewsGuild-CWA, and authorize the Employer to deduct biweekly from any salary earned or to be earned by me as an employee…

(Jt. Exh. 1 at 4) There is no evidence that, during bargaining, the parties discussed limiting dues deduction to wages earned performing VRS interpreting, as opposed to community work.

It is undisputed that, for a year following its execution of the collective-bargaining agreement, Respondent deducted dues from all wages earned by unit employees who had executed a check-off authorization, regardless of whether those wages were attributable to community, as opposed to VRS, work. According to Haraz, she discovered this practice—which she characterized as an "administrative error"—in May 2016; Respondent thereafter ceased deducting dues except for those attributable to wages earned for VRS work. The Union was not consulted regarding Haraz' discovery of this "error" or Respondent's cessation of withholding community work-related dues. (Tr. 1018–1020, 1041; Jt. Exh. 40)

2. Analysis

Section 8(d) specifies that during the term of a contract, the duty to bargain collectively "shall also mean that no party to such contract shall terminate *or modify* such contract . . . . " When an employer party to an existing agreement modifies a term of that contract midterm, without the consent of the Union, the employer has violated section 8(d), and therefore has committed a ULP under section 8(a)(5). Essentially, an 8(d) allegation is "a failure to adhere to the contract." *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

In Section 8(d) contract-modification cases, the Board applies a "sound arguable basis" approach to determine whether the employer's action supported by, or is an unlawful modification of, the contract. See id. at 502–503. Once the General Counsel has identified a specific term contained in the contract that the employer has modified (in this case, the dues-checkoff provision), the employer—to avoid a violation—must demonstrate that the contested action was taken based on an interpretation of that provision, for which it had a "sound arguable basis" and further that it was not "motivated by union animus or . . . acting in bad faith . . . . "' Id. at 502 (internal citations omitted); *Milwaukee Spring Div.*, 268 NLRB 601, 601 (1984). Under this standard, the employer is not required to prove that its interpretation is correct, nor a more correct interpretation than that presented by the union; instead, it must merely show that its interpretation is colorable. *Bath Iron Works*, 345 NLRB at 503.

In this case, Respondent maintains that its conduct was lawful because: (a) the Union waived its right to dues related to community interpreting work and/or (b) Respondent had a sound arguable basis for believing the Union had done so. In support of its waiver argument, Respondent argues that, when the Union accepted its rejection of a pay differential for all community interpreting work, it effectively walked away from its right the portion of dues related to such work. I cannot agree. As noted, supra, the "clear and unmistakable" standard requires that: (a) the subject alleged to have been waived was fully discussed by the parties, and (b) the party alleged to have waived its rights did so explicitly and with the full intent to release its interest in the matter. *Allison Corp.*, 330 NLRB at 1365. Nor is there any indication that the parties ever discussed carving out community interpreting work from the contract's dues-checkoff provision, let alone that the Union acquiesced to such an action. Moreover, as I have found, the parties' bargaining history does not support a conclusion that the Union clearly and unmistakably waived the right to bargain over community interpreting work in general.

I further find that Respondent has failed to demonstrate that it had a sound, arguable basis for its claimed belief that no dues were required to be deducted for community interpreting work. After the Union took the unambiguous position that community interpreting was bargaining unit work, Respondent expressly agreed to deduct dues from "any salary earned" by employees it knew to perform community interpreting work. As such, there is no plausible rationale for Respondent's professed understanding that "any salary earned" in fact referred to any salary minus earnings from community interpreting work. Nor am I convinced of Respondent's good faith in its handling of the dues deductions; I find it extremely unlikely that, for an entire year, Respondent mistakenly withheld dues (oddly, in strict accordance with the contract language) and only ceased doing so because Haraz "discovered" this. Surely, a party acting in good faith would have immediately informed the Union of its mistake and sought to make employees whole

for what would have amounted to a prohibited employer monetary contribution to a labor organization in violation of Section 8(a)(2) of the Act.

Accordingly, I find that, since about May 2016, the Respondent has failed to continue in effect all of the terms and conditions of the parties' contract by ceasing the deduction of union dues and fees from the community interpreting wages of employees who authorized such deductions and by ceasing the remittance of those dues and fees to the Union. Respondent has thereby refused to bargain with the Union within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.

D. Enforcement of disciplinary standards for customer complaints [¶ 6(j)]

The General Counsel alleges that, since approximately January 2016, Respondent has more strictly enforced its disciplinary standards related to customer complaints against VIs in its San Diego and Denver call centers. This conduct, it is alleged, constituted 8(a)(3) discrimination. I find no merit to this allegation.

1. Facts

Yost testified that, in his role as the Union's staff representative, he noticed a significant uptick in customer complaint discipline during the first half of 2016. He testified that he "sniffed a new policy" was to blame. On July 22, he sent Haraz a letter complaining about "recent and multiple" customer complaint disciplines issued to unit employees. According to his unrebutted testimony, Respondent did not respond. (GC Exh. 59; Tr. 2684–2686)

By way of background, complaints filed by Respondent's customers—regardless of the call center to which they relate—are directed to Respondent's customer experience manager, Christy McBee (McBee), who, on a monthly basis, reviews and investigates them. She then categorizes each complaint by "type" and shares this information with center managers and upper management in the form of monthly Excel spreadsheet reports. Beginning in 2012, Respondent began the process of generating "VI trend reports," which compile the complaints (and commendations) received by each interpreter over a running 12-month period. (Tr. 2186–2187, 2391–2392, 2402–2404) There is no evidence of an orchestrated effort by management in 2016 to increase customer complaint discipline or change the standards therefor.[13]

Instead, the evidence relied on by the General Counsel in support of this allegation is largely statistical, in the form of an increase in percentage of customer complaints resulting in discipline at its San Diego and Denver call centers:

	2014	2015	2016	First ½ 2017
San Diego	1.78	1.6	7.14	8.0
Denver	2.56	3.57	2.6	2.13

[13] Former Center Manager Jonagan testified that, at some point after July 2015, she was instructed by Stambaugh to discipline certain VIs contrary to prior practice, her purview was limited to the Tempe call center and she did not specify whether those disciplines were based on customer complaints. (Tr. 758)

On its face, this evidence indicates that in 2016, as alleged, there was a significant increase in the discipline-per-customer complaint ratio in San Diego; in Denver, however, the percentage increased by a statistically insignificant amount (.04 percent) that year, only to drop during the first six months of 2017.

The testimonial evidence regarding the alleged "uptick" in customer complaints was anecdotal. For example, former San Diego center manager Marguerite Brooks, who served in that role from 2008–2011, testified that during that period, she personally did not issue any discipline for customer complaints and that, after she stepped down to a VI position, she received one customer complaint in 2014 that was "written off" due to a computer malfunction and another that resulted in her receiving a discipline. San Diego VI Villegas testified that, while she had been counseled, but not disciplined, based on a customer complaint in 2010 or 2011, she received a warning for one in 2016. Likewise, Denver VI Espinoza testified that, prior to June 2016, she had received, at most, only "supportive" coaching for her customer complaints, but thereafter received written discipline. (Tr. 2086–2087, 2105–2106, 2315–2318, 2434–2438; Jt. Exh. 83)

2. Analysis

The Board will find a violation of Section 8(a)(3) where an employer "increases discipline of its employees or more strictly enforces its work rules in response to union activities." *Kitsap Tenant Support Services*, 366 NLRB No. 98, slip op. at 21 (2018) (citing *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987), enfd. 928 F.2d 609 (2d Cir. 1991)). The burden shifting in such a case works as follows:

> If the General Counsel demonstrates that the pattern of discipline after the commencement of union activity deviated from the pattern prior to the start of union activity, a prima facie case of discriminatory motive is established requiring the Respondent to show that its increased discipline was motivated by considerations unrelated to its employees' union activities.

Id. (citing *Jennie-O Foods*, 301 NLRB 305, 311 (1991)).

The Board recently found this burden to be met in *Kitsap Tenant Support Services*, 366 NLRB No. 98, supra. In that case, a sharp increase in discipline occurred immediately following a union election and was found attributable to the employer increasing its inspections in both frequency and level of detail, issuing discipline for infractions previously not met with discipline and increasing its documentation of discipline. Moreover, several statements attributed to managers all but admitted that it was deliberately ramping up discipline. Thus, the changed pattern found to establish a prima facie case was far from purely numerical. Id. Moreover, the Board focused on the timing of the increased discipline, which closely corresponded to the employees' union activity. Id. (citing *St. John's Community Services—New Jersey*, 355 NLRB 414, 414–415 (2010) (employer violated Section 8(a)(3) where, prior to unionization, it inconsistently enforced its medication administration policy, told an employee that it would go

"by the book" because of its employees' union activity, and discharged an employee under its new "by the book" policy "less than 2 weeks after the [u]nion's certification")).

In this case, while an increase in discipline (significant in San Diego and meager in Denver) occurred in 2016, the record simply does not demonstrate a contemporaneous change in Respondent's practice in handling customer complaints. (GC Br. at 118) Without a showing that Respondent's conduct—as opposed to some other factor such as a spate of serious, substantiated customer complaints—was responsible for the increased instance of discipline, I am not willing to assume such to be the case. Nor is there any close correlation to a spike in union activity at either location, at which the Union had been certified for three years; based solely on the fact of a numerical increase, I cannot find it was caused by Respondent systematically manipulating its customer complaint investigation process in order to punish San Diego and Denver bargaining unit employees.

Statistical proof alone may be sufficient to make out a prima facie case for disparate impact under statutes prohibiting employment discrimination,[14] and the Board has followed this reasoning at least once under the guise of its "inherently destructive" theory. See *Aztech Electric Co.*, 335 NLRB 260 (2001) (citing *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967)). In the *Aztech Electric* case, however, the Board found a facially valid hiring rule (rejecting applicants whose prior wage rate met a certain threshold) to have a disparate impact on union adherents and therefore was sufficient under *Great Dane* to establish animus. Here, by contrast, there is no evidence (other than Yost's olfactory sense) that Respondent maintained any specific standard or practice that worked to discriminate against union adherents. Indeed, there is no evidence that union adherents received customer complaint discipline in disproportionate amounts as compared to their non-adherent counterparts.

Accordingly, I find that the General Counsel has failed to state a prima facie case of discrimination and recommend that the allegation stated at ¶ 6(j) of the complaint be dismissed.

E. Scheduling practices for full-time VIs [¶ 8(b)]

According to the General Counsel, Respondent violated Section 8(d) of the Act in May 2016 by unilaterally modifying the CBA provision requiring that it give scheduling preference to full-time Unit employees. This action was the subject of a grievance filed by the Union that, as of the close of hearing, had yet to go to arbitration.

[14] See *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642 (1989).

1. Facts

This allegation involves the parties' codification in their initial contract of an historical scheduling practice; accordingly, I will address the practice, the contractual language and the alleged modification:

a. Respondent's scheduling practices

Since at least 2010, Respondent has used a system called "performance based scheduling" to create its work schedules. In practice, this process primarily involves a bid system whereby full-time VIs, followed by flex VIs, submit preference sheets identifying the hours that they prefer to work during an upcoming 6-week scheduling period. Notably, flex VIs are not limited to selecting work shifts from those left unfilled by full-time employees. Full-time VIs are guaranteed 32 hours per week, both under the CBA and by historical practice. Flex VIs, by contrast, get no such guarantee, but may dictate the shifts that they are willing to work. Once the employees' preferred schedules are submitted, each center manager inputs them into a template (called a "center profile") representing the VI shifts necessary to cover the center's operating hours during the upcoming schedule period. The manager first "plugs in" the full-time VI's requested schedules—in order of their performance ranking—into the template; then she plugs in flex VIs' requested schedules into any remaining open shifts.

The steps outlined above, however, do not always succeed in covering the center's operating hours, due to the fact that, even after the requested hours for full-time and flex VIs are inputted into the schedule, there may remain "gaps," that is, hours in the center profile for which no VI has requested to work. As management witnesses testified, in order to fill these gaps, preferred hours must be shifted away from full-time VIs in reverse order of their original assignment (i.e., by assigning the lowest performance ranked full-time VI to the first "gap" period and so on). (Tr. 1201–1204, 1347, 2115–2116, 2305–2306, 2811; Jt. Exh. 1 at 9)

b. The contractual language

The parties' attempted to codify this process in article 13 of the parties' CBA, which states in relevant part:

> 1. Center profiles shall be posted six (6) weeks in advance of the period for which they apply. Employees may supply their manager with a preference sheet not later than one (1) week following the posting of the center profile. The preference sheet should include hours and/or days that the employee would prefer not to work, which will be considered by management in composing the schedule. In accordance with Section 4 below, available hours shall be given first to full-time employees then to flex-staff who elect to be pre-scheduled. All remaining hours will be posted on Swapboard.
>
> * * *

> 4. Purple will schedule full-time staff interpreters following the order set forth in the Performance Based Scheduling model. A full-time interpreters ranking will be calculated using the following performance factors: 40% Schedule Adherence; 35% Key Performance Indicators; 25% Company Seniority. Purple reserves the right to implement Performance Based Scheduling for flex-staff members prior to the opening of Swapboard. Purple will provide a ranking only to those flex-staff interpreters who work greater than twenty-four (24) hours in a month. A flex-staff interpreters ranking will be calculated using the following performance factors: 40% Schedule Adherence; 35% Key Performance Indicators; 20% Engagement; and 5% Company Seniority. In the event of a tied composite score, seniority will be used to determine rank. In the rare instance that tenure doesn't resolve a tied composite score, total number of labor hours worked in the period will be used as the tie break methodology.
>
> * * *
>
> 6. Management will make a reasonable effort to avoid scheduling an employee for hours and/or days that the employee has indicated on the preference sheet that he/she prefers not to work.

(Jt. Exh. 1 at 11) As noted, supra, the contract provides for final and binding arbitration of disputes over its interpretation, meaning or application. (Jt. Exh. 1 at 6–7)

c. The alleged contract modification

Numerous full-time VIs testified that in the spring of 2016, Respondent began denying their scheduling requests at an unprecedented rate. The change was marked; multiple VIs testified that they went from consistently receiving their requested schedules (with only minor exceptions) to consistently being denied their requested shifts and instead assigned shifts they had indicated they did not want to work. Respondent's management witnesses, however, testified nearly unanimously that they had not departed from their established scheduling practices.[15] The failure to grant full-time VIs their requested schedules, managers testified, resulted from a diminishing number of available VIs to cover shifts sufficient to fill the center profiles. Essentially, Respondent contends that, in order fill the "gaps" left after employees' preferred schedules were inserted into the scheduling template, it was forced to move hours away from full-time VIs to a greater extent than usual, which it was entitled to do pursuant to article 13. (Tr. 1103–1109, 2120-2121, 2131-2132, 2164–2169, 2173, 2177, 2305, 2407, 2810–2812)

[15] The exception was Center Supervisor Kristill Brown. She, according to Yost's unrebutted testimony, admitted that she knew that full-time VIs were unhappy with their schedules, but that her "hands were tied," as she had been "directed to schedule that way" from "the very top." (Tr. 2658–2659)

2. Analysis

Changes in employee work shifts are mandatory subjects of bargaining, rendering a mid-term modification of a clear and unambiguous contract term regarding scheduling unlawful. *Meat Cutters Local 1289 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1995); *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006). Based on the VI testimony, it is clear that the scheduling conducted in the Spring of 2016 resulted in multiple full-time employees being denied their preferred schedules. The proper inquiry under a Section 8(d) framework, however, is whether this action was clearly and unambiguously forbidden by the contractual language. In other words, it must be shown that the allegedly modified contract provision is "clear on its face and requires no construction or interpretation beyond its plain meaning." *Meilman Food Industries, Inc.*, 234 NLRB 698, 698 (1978), affd. 593 F.2d 1370 (D.C. Cir. 1979).

By contrast, where a contractual provision is less than clear and unambiguous, the appropriate course is deferral to the parties' grievance/arbitration procedure in accordance with congressional intent[16] and the Board's deferral policy set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971). In that case, the Board established the general rule that it would refrain from adjudicating an unfair labor practice issue that arises from the parties' collective-bargaining agreement if the agreement provides for arbitration as the method of resolving disputes over the meaning of its provisions. An issue is well-suited to arbitral resolution when "the meaning of a contract provision is at the heart of the dispute." *San Juan Bautista Medical Center*, 356 NLRB 736, 737 (2011).

Here, I find article 13, which indisputably controls the outcome of this allegation, is not entirely clear and unambiguous on its face. It provides that full-time VIs will be scheduled "first," but does not guarantee that, once the scheduling process is complete, they will receive any or all of their requested hours. At best, it obligates Respondent to make a "reasonable effort" to avoid assigning full-time VIs shifts that they had affirmatively deselected in their submitted preference sheets. That full-time employees were denied their requested schedules does not, in itself, demonstrate that Respondent—in light of the staffing shortfall it experienced—*unreasonably* assigned them shifts they had deselected. Put differently, it is possible that the Spring 2016 schedules with which full-time employees were dissatisfied nonetheless reflected Respondent's best effort to avoid assigning them their deselected shifts. This determination, I find, is best left to an arbitrator.

Based on the absence of a clear and unambiguous contract term to enforce, I find that the allegation set forth in ¶ 8(b) of the complaint should be deferred to the parties' contractual grievance-arbitration procedure.

[16] Congress has declared labor arbitration to be the most desirable means of achieving the final binding adjustment of contract disputes when arbitration has been agreed to by the parties. See Labor Management Relations Act Sec. 203(d) ("[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement"); see also *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 202 (1991) ("[a]rbitrators and courts are still the principal sources of contract interpretation," and "the Board is neither the sole nor the primary source of authority in such matters").

F. Threat and investigation of employees involved in teaming reports [¶ 5(r), ¶ 6(c)]

The General Counsel alleges that, on July 29 and August 26, Human Resources Business Partner Haraz, unilaterally and discriminatorily undertook an investigation into VIs involved in "teaming reports" in violation of Sections 8(a)(5) and (3). It is also alleged that, by announcing her intention to conduct such an investigation, Haraz threatened employees with unspecified reprisals.

1. Facts

During the summer of 2016, the Union requested information regarding customer complaint discipline issued to unit employees Wayne Wilson (Wilson) and Ava Sterling (Sterling). Specifically, it sought copies of "teaming reports," on the dates on which each employee had received complaints that were the basis for discipline. Neither item is the subject of an information-request allegation; instead, Haraz' response is alleged to have violated the Act.

By way of background, "teaming" refers to the assistance provided by a VI to another VI (at the latter's request) during an especially difficult video call. That support might consist of helping to interpret, or providing emotional support for, a call involving challenging or sensitive subject matter. As Yost explained, "teaming" may, in effect, provide a VI with a witness to a call with a difficult or abusive customer; he therefore made a practice of requesting teaming reports (i.e., reports describing teaming incidents) in connection with grievances over customer complaint discipline. (Tr. 1879, 2688–2689; Jt. Exhs. 91, 95)

In the case of his requests for Wilson and Sterling's teaming reports, Haraz' responses each stated as follows:

> Since the union has raised issue of teaming reports and is implicating that there may be other employees involved in these complaints, the employer is obligated to investigate the behavior of all employees in these teaming reports.

According to Haraz, she believed that, by its information requests, the Union may have been "implying" that a different VI was responsible for the customer complaints issued Wilson and Sterling, and she wanted to ensure that Respondent fully investigated the matter, so that it did not inappropriately discipline Sterling or Wilson. (Jt. Exh. 94, 95; Tr. 1703–1704)

As noted, the General Counsel also accuses Respondent of making good on Haraz' insinuation by "investigat[ing] the behavior of its employees represented by the Union in teaming reports." By its answer, Respondent admits that it did conduct "an investigation" around the time period in question. That said, both Haraz and Stambaugh credibly denied that the investigation referred to Haraz' email—an investigation of all employees involved in teaming reports—ever actually occurred. The documentary evidence supports their testimony. On August 24, Operations Regional Manager Stambaugh emailed McBee, who, as noted, has primary responsibility for investigating customer complaints. Forwarding customer complaint files for two VIs who were grieving discipline they had received for recent complaints (one was

Wilson, but Sterling was not mentioned), Stambaugh asked McBee to provide her with information regarding the two underlying complaints. Specifically, she stated:

> You had previously helped me with investigatory information on complaints for a couple of VI's. We have additional grievances and I am wondering if you can help me again with the same information for two more VI's? Would it be possible to get information on whether the VI had a team, switched out the call or transferred the following calls and to determine if there were problem reports associated to the complaints?

At hearing, Stambaugh credibly testified that her purpose in gathering this information was to assist Haraz in responding to the Union's information requests accompanying the grievances, something she regularly did. (Tr. 1840–1841, 2715; GC Exh. 77)

Two days later, McBee responded, provided what she termed, "investigation findings" in the form of an historical digest of customer complaints lodged against each grievant, listing factual summaries and a notation indicating the type of performance issue involved, i.e., "call procedure," "professional skills," etc. The digests appear to contain a single reference to a "teaming" incident in May 2016, during which Wilson apparently received assistance from a VI identified by employee number, but there is no reference to this individual's conduct, or that of any other non-grievant employee. Stambaugh forwarded McBee's email, with the attachments, to Haraz, stating, "[t]his should complete the information needed from operations to respond to these grievances, please let me know if there is anything outstanding…" (Id.; Tr. 1840–1841, 1855–1856)

2. Analysis

Threat of unspecified reprisals: I find that Haraz' statement that Respondent was "obligated" to investigate employees constituted coercion within the meaning of Section 8(a)(1) of the Act. As a preliminary matter, her claimed intent for making this statement (i.e., that she wanted to ensure that the correct employee was punished for the customer complaint) is simply irrelevant to my analysis. The test for deciding whether a statement constitutes a threat is whether it reasonably tends to coerce employees in the exercise of their statutory rights. *Exterior Systems*, 338 NLRB 677, 679 (2002); *Southdown Care Center*, 308 NLRB 225, 227 (1992); *Swift Textiles*, 242 NLRB 691, 691, fn. 2 (1979).

Applying this standard here, I conclude that a reasonable employee would be unlawfully coerced by Haraz' statements. There is no question that Respondent is entitled to investigate thoroughly customer complaints, including evaluating the performance of all employee participants on the call in question. Indeed, because Respondent so obviously holds that prerogative, Haraz' announcement that non-grievant employees would now be investigated was decidedly gratuitous. I believe that a reasonable VI would appreciate this and accurately assess the statements as an unsolicited reminder that, by electing to assist (and potentially corroborate) a coworker, he risked being blamed for a customer complaint himself. Also concerning is that Haraz couched her threat as a response to the Union's statutorily-entitled search for exculpatory information furtherance of a grievance; identifying the Union as responsible for employees being

investigated would certainly work to chill a reasonable employee in seeking the Union's assistance with grievances and information requests.

For the foregoing reasons, I find that Haraz, by her July 29 and August 26 emails, unlawfully threatened employees with unspecified reprisals, in violation of Section 8(a)(1) of the Act.

8(a)(3) and (5) allegations: Turning to the complaint allegations that, around the same time period of Haraz' email, Respondent unilaterally and discriminatorily "investigated the behavior of its employees represented by the Union in teaming reports,"[17] I find no merit to either allegation.

As discussed above, the evidence shows that, at most, Respondent conducted what appears to be a standard internal investigation—not for the purpose of rooting out wrongdoing by employees who served as witnesses to teaming incidents, but rather to respond to grievances and accompanying information requests. There is simply no evidence that Respondent ever conducted an investigation such as the one alleged, that is, an investigation into non-grievant employees mentioned in teaming reports. Nor is there any indication that the investigation that was conducted was spurred by animus or undertaken in contravention of past practice. As such, I find that the General Counsel has failed to make a prima facie case with respect to the remaining allegations that Respondent made good on Haraz' threat by investigating VIs involved in "teaming reports" in violation of Sections 8(a)(3) and (5). I therefore recommend that the allegations set forth at ¶ 6(c) of the complaint be dismissed.

G. Allegations regarding May 3, 2016

Interpreter Appreciation Day is a nationally recognized event within the interpreter community celebrated annually on May 4. In 2016, Respondent recognized this event in its call centers on the designated day by providing food, setting up banners, signs, and decorations,[18] as well as holding games and activities for center employees, including puzzles and craft making. The food and craft activities were located in break rooms and on tables throughout the centers. Employees were not released from work to partake in the celebration, but rather dropped in throughout the day during their break time. A day before this event, VI-stewards held their own interpreter appreciation day celebrations at three of the unionized centers (Tempe, San Diego, and Denver), mainly in employee break rooms. The events were planned by the Union's bargaining committee and funded by the Union; there is no evidence, however, that Staff Representative Yost (or any other non-employee, Union official) participated—instead, VI-stewards brought in food, signage and decorations to the call centers.

Managers and supervisors at the Denver, Tempe, and San Diego call centers quickly became aware of the unit employees' unofficial "Appreciation Day" celebration. Their response including monitoring and recording the event; they also alerted Haraz, who interrogated

[17] Although the complaint's syntax is somewhat confusing, as the Union does not somehow "represent . . . employees in teaming reports," I read this paragraph to allege that Respondent investigated unit employees whose names appeared in teaming reports.

[18] This decor was similar to that provided for other, Respondent-sponsored events and celebrations (i.e., winter holidays, Halloween, etc.). (Tr. 414, 705–719, 1067–1070; 1089–1091; 1142–1144; GC Exhs. 10(a), 34)

individual employees to determine who was responsible, issued a new, preapproval requirement for bringing food into break rooms and ordered the food and decorations removed. According to Haraz, unlike Respondent's official celebration, the pro-union events were a "distraction" for employees. (Tr. 745–748, 837, 967–968, 2711–2712)

Numerous witnesses testified that, prior to May 3, it had been a regular practice for employees to bring food to share at the Tempe, San Diego and Denver break rooms to share. As a former San Diego VI testified, "if the kitchen table was empty, we were really surprised." Management itself sponsored events that included break-room food, such as office pot lucks and cook-off contests. During such events, employees were allowed to come and go during their break time without disrupting others' work. VIs also testified consistently that, prior to May 3, there was no requirement that an employee receive prior approval from management before bringing in food for her coworkers. Nor could any VI recall a manager previously removing, or ordering the removal of, food from a break room, or any employee being reported to human resources or spoken with by management for bringing in food.[19] Nor is there any evidence that, prior to May 3, any steward had been required to get "permission" before accessing her call center's non-production areas, such the employee break room. (Tr. 414, 599–601, 603, 612, 615, 700–703, 840–844, 1090–1091, 1102, 1147–1148, 1156, 1259–1262, 1280, 1910, 1975–1976, 2008, 2302–2303, 2369, 2469; GC Exh. 96)

Respondent's main defense of its supervisor and managers' conduct is that it had a sound, arguable basis for believing that the pro-union events violated article 24 of the CBA, which restricts the access of union staff representatives, such as Yost. This reliance, it argues, warranted Respondent taking numerous allegedly coercive actions to enforce its rights under the contract. Before turning to the merits of the individual allegations, I will address this broad defense. As discussed, supra, article 24 governs the access of union staff representatives to non-production areas of Respondent's call centers (such as break rooms), and specifically provides that such individuals shall be allowed "reasonable access" to such areas "after coordinating with the Call Center Manager." Essentially, Respondent contends that, when individual VI-stewards—without consulting with management—brought in food, signage and decorations in support of their Appreciation Day event, Respondent had a sound arguable basis for believing that their collective action amounted to a violation of article 24 by the Union. Based on this rationale, Respondent argues that its actions on May 3 and thereafter—ranging from interrogations, ordering the removal of union displays and food, and promulgation of rules banning pro-union activities—are excused by its good-faith effort to enforce article 24's "consultation" requirement. (R. Br. at 82–89)

As a preliminary matter, I do not agree with Respondent's unsupported claim that the Board recognizes a blanket defense to any unfair labor practice allegation based on an employer's reasonable, good-faith application of a contractual provision.[20] Respondent is alleged to have

[19] Although Stambaugh testified that, on an unspecified date in the year preceding her appearance, Respondent denied an employee's request to hold a baby shower in the Denver call center, I find this anecdotal evidence, without more, too vague to be reliable. (Tr. 413, 429)

[20] The Board cases cited by Respondent address situations in which a dispute is *solely* one of contract interpretation, in which case the Board "will not seek to determine which of two equally plausible contract interpretations is correct," and will not find a 8(a)(5) violation if the employer has a "sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the

promulgated unlawful rules, made unilateral changes and discriminated against pro-union activity. With respect to the first two statutory violations, Respondent's reliance on contractual language is irrelevant, as motive is not an element of either. With respect to the last, to the extent Respondent offers its good-faith application of the contract as a legitimate business defense for its actions,[21] I find it wanting. The parties' contract contains several terms regarding "stewards" and in no way requires them to gain permission before entering non-production areas, such as employee break rooms. Article 24's "prior consultation" requirement explicitly governs the conduct of "union staff representatives," of whom none were shown to be present at a call center on May 3.

Respondent essentially asks me to find that, when its managers and supervisors acted that day, they believed they were lawfully enforcing on VI-stewards a contractual obligation expressly limited to higher-level union representatives. I generally found these managers and supervisors—most of who testified—to be far too intelligent to hold such a belief. This was confirmed by the notable lack of credible evidence of this supposed understanding, as well as the failure of managers and supervisors, in reacting to the pro-union events on May 3, to contact any union official or even refer—in the various meetings held that day with stewards—to Article 24.[22] Nor did Respondent apply article 24 to all stewards on May 3; as discussed infra, Haraz herself condoned two stewards bringing in food that was *not* accompanied by any union materials or decorations to the Tempe call center that very day.

Finally, the documentary evidence indicates that, as late as October 21, there was little consensus among management as to whether stewards were actually prohibited from bringing in food for their coworkers. On that day, in an email to upper management, San Diego Center Manager Henrik Ek reported sought advice on how to handle "a Union Steward who has lately been bringing food for the employees on behalf of ASLIU." He continued:

> I have brought this issue up before, but never received word on how we should handle it. I think [Haraz] needs to talk to [Yost] to get a handle on how we should proceed since technically, it's not the Union that's providing the food.

(GC Exh. 84) This particularly damning evidence, along with the record as a whole, leads me to believe that Respondent's professed belief that stewards are subject to Article 24's preauthorization requirement amounts to no more than an after-the-fact rationale to explain away

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terms of the contract as he construes it." *Crest Litho*, 308 NLRB 108, 110 (1992) (quoting *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988), and *Vickers, Inc.*, 153 NLRB 561, 570 (1965)).

[21] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[22] It appears that Center Supervisor Leo told steward Proper the following day that she believed that bringing in food and decorations violated the contract, she did not specify any provision; considering the lapse of time and Leo's relatively low supervisory status, I do not find this sufficient evidence to impute such a belief to Respondent on the day prior. (Tr. 1169)

its conduct.[23] For these reasons, I reject Respondent's broad defense that it was entitled to engage in otherwise coercive conduct because it had a "sound, arguable" basis for believing that, in doing so, it was enforcing the parties' collective-bargaining agreement.

A discussion of the individual allegations stemming from the May 3 "Appreciation Day" events follows:

1. Events in Denver [¶ 5(i)(4), (5), (6); ¶ 5(k); ¶ 5(ii)]

a. Facts

The Denver call center, like the other centers, consists of multiple cubicle workstations (referred to as the "production floor") in which the VIs perform their work. Outside each workstation is a small white board on which employees indicate their work hours and break times, as well as share messages with each other. The outer walls of the cubicles are decorated with work and non-work related items, including collages, union slogans and logos, inspirational quotes and other decorations. Although VIs do not have fixed workstations, they "personalize" their work stations with rolling carts placed outside their stations. In addition to posting union slogans and logos, employees use decorations to express their union sentiments; during bargaining negotiations, and upon the ratification of the CBA, pro-union employees brought food into the break room and decorated the center with balloons. The Denver break room contains a bulletin board for union postings, as well as another board containing other, non-work materials, such as birth announcements, fundraising solicitations, and business cards. (Tr. 414, 1067–1070, 1089–1091, 1093–1094, 1142–1144, 1148, 1155; GC Exh. 34)

On May 3, VI-steward Liz Keyser (Keyser), on behalf of the Union, brought food to work at the Denver call center for the union's "appreciation" event. Accompanied by fellow VI-stewards May-ra Proper (Proper) and Sarah Spencer (Spencer), she set up a display on the break room table consisting of a spread of food backed by a white board stating, "ASL/IU Wishes You a Very Happy Interpreter Appreciation Day. Thank you for all you do." Next to the announcement, they placed a binder containing the parties' recently executed CBA. They also decorated the union bulletin board with balloons and, on the production floor, distributed balloons to individual VIs who placed them outside their cubicles. (Tr. 1061–1062, 1086–1089, 1097, 1122, 1138–1139; GC Exh. 35)

Center Supervisor Kelly Leo (Leo) learned about their actions shortly thereafter, when Keyser invited her to share food in the break room. Leo then observed individuals she described as "union stewards" putting up balloons. She determined that a union event was underway and called Haraz, who instructed her to "show her" what was going on. Leo then walked down the

[23] Even Haraz' explanation for her actions appear to reflect unsuccessful coaching: she testified that she ordered the pro-union food and displays removed, "[b]ecause, first of all, if you were to go back to look at article 24 of the collective bargaining agreement, that's definitely in violation, but more than anything, that aside, you can't have large—you can't have a party in the center area when people are working." (Tr. 204–205)

hallway between the VI cubicles, using her phone to "facetime"[24] the VIs' balloon display to Haraz. She was observed by Proper, who described Leo as walking down the hallway with her phone held out, face high, approximately a foot ahead of hers, apparently either recording or face timing with someone. According to Proper, Leo's conduct was highly unusual in that filming or recording on the center floor was discouraged, due to the confidential nature of the calls being interpreted. (Tr. 1140–1141, 1493–1495)

Following her phone call with Leo, Haraz consulted with upper management; shortly thereafter, Vice-President of Operations Cummings alerted center management at the Tempe, San Diego and Oakland centers that, "apparently union stewards are decorating our centers for interpreter appreciation day." She instructed them that, "[i]f you have decorations from the union appearing in your center, please let [Haraz] know what is happening and she will provide you direction." (Jt. Exh. 3; Tr. 263)

Back in Denver, Leo ordered VI-steward Spencer to her office, where Haraz appeared via video. Haraz then asked Spencer whether she had brought in the food, and Spencer said yes. Haraz replied, "you can't do that." When Spencer questioned why, Haraz stated, "you cannot feed the interpreters without our permission"; she then instructed Spencer to remove the food from the break room. She next asked Spencer whether she had brought in balloons. Spencer said yes, to which Haraz responded, "you need to take those down." When Spencer questioned why the balloons needed to be removed, Haraz responded that it was impermissible to have "anything out on the production floor." Later, Leo and Proper discussed the day's events. Proper complained about Leo reporting the food and decorations to human resources, to which Leo responded that it was her responsibility to report union activity. (Tr. 203–206, 261–263, 966, 1097–1101, 1508–1509, 1511; Jt. Exh. 4)

Leo summarized the day's events in an email to Stambaugh and Haraz, which Haraz in turn forwarded to upper management, including Greg Camp (Camp), Cummings, and Kim Surrency (Surrency). Days later, on May 9, Stambaugh took a picture of a union announcement posted in the Denver break room, which she sent to upper management, including Camp, Surrency, and Leo. (Tr. 1399; GC Exh. 44; Jt. Exh. 4)

b. Analysis

(i) Leo "face timing" [¶ 5(k)]

The General Counsel argues that, by "face timing" the pro-union call center decorations on May 3, Leo engaged in unlawful surveillance. Respondent argues that Leo's conduct was lawful, as it amounted to no more than the observation of openly conducted union activity. I agree with Respondent.

[24] While "face timing" more commonly refers to the use of a mobile device application that enables people to communicate while simultaneously observing each other on a video display, Leo "showed" Haraz the call center decorations by using the same application to transmit the images at which her device was aimed. (Tr. 1495)

It is well settled that an employer's mere observation (i.e., without recording) of openly conducted openly conducted on its employer premises will generally not be considered unlawful. See, e.g., *Roadway Package System, Inc.*, 302 NLRB 961, 961 (1991). There is no question that the VI's Appreciation Day events in Denver were openly conducted—indeed, Leo learned of them from VI-steward Keyser, who invited her to share in the food provided. While Leo used the Facetime application to enable Haraz to "observe" the balloon decorations, there is no evidence that she additionally used this technology to photograph or record any image on May 3. As such, I find that Leo's conduct did not amount to unlawful surveillance and recommend that ¶ 5(k) of the complaint be dismissed.[25]

(ii) Haraz conduct [¶ 5(i)(4), (5), (6)]

The General Counsel alleges that, during her video meeting with Spencer, Haraz unlawfully interrogated her, promulgated an unlawful and discriminatory rule prohibiting union materials in the break room, and unlawfully directed Spencer to remove the union-provided food. I agree and find that Respondent, by Haraz, violated ¶ 5(i)(4), (5) and (6) of the complaint as alleged.

Interrogation: The Board recognizes that the lawfulness of particular questioning must be considered under all the circumstances and there are no particular factors "to be mechanically applied in each case." *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). That said, consideration may be given to the following: whether the employee is an open and active union supporter; whether there is a history of employer anti-union hostility or discrimination; the nature of the information sought (especially if it could result in action against individual employees); the position of the questioner in the company hierarchy; and the place and method of interrogation. See *Rossmore House*, supra. The Board also considers the timing of the interrogation and whether other unfair labor practices were occurring or had occurred. See *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 17 (2016).

Here, the circumstances of the questioning of Proper dictate a finding of unlawful interrogation. Without explanation, she was summarily ordered to participate in a video conference with Haraz—Respondent's highest ranking human resources official—on the very day that she had participated in the union's "Appreciation Day" event, and shortly after Leo had appeared to video record the evidence of her actions. In addition, CEO Rae's March/April emails and management's broad clamp down on email use for union business (contrary to the Board's order) amply establish a background of hostility against the Union. Finally, Haraz' questioning was clearly aimed to determine who was to "blame" for pro-union activity; under the circumstances, I do not find Spencer's status as a union steward to privilege the highly coercive nature of Haraz' questioning. See *Far West Fibres, Inc.*, 331 NLRB 950, 951 (2000)

[25] It does appear that Leo's conduct, as viewed by Proper, created the may have created the impression of surveillance. See *CBS Records Division*, 223 NLRB 709 (1976) (employer's focusing closed-circuit camera on union headquarters unlawful even where no surveillance actually conducted). However, this was not alleged.

(questioning aimed at determining an individual employee's role in union conduct will be found to constitute unlawful interrogation).

Unlawful rule: It is well established that employees' right to engage in Section 7 conduct may not be abrogated by requiring them to obtain prior authorization before doing so. *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 4 (2017) (citations omitted); *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 553 (2003) ("[t]he Board law is clear, employees do not need [their employer's] permission, written or otherwise, to engage in protected activities") (citing *Brunswick Corp.*, 282 NLRB 794, 798 (1987)). Therefore, Haraz' pronouncement that Spencer (whom she considered responsible for the pro-union food display) could not provide her coworkers food without Respondent's permission, violated the Act. Moreover, the rule was clearly promulgated in response to Section 7 activity (Spencer's lead role in the union's Denver "appreciation day" event) and, by its terms, explicitly restricted such activity. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004). As such, I find that Haraz' orally promulgated rule violated Section 8(a)(1).

Finally, Haraz' promulgating a new policy requiring management permission before allowing access to the Denver break room for union-sponsored activities violated Section 8(a)(3). Employees' use of the employer's premises to conduct activities protected by Section 7 of the Act is not a matter solely within their employer's discretion, and an employer violates the Act by withdrawing permission for use of its premises for anti-union reasons. *St. Joseph Med. Ctr.,* 276 NLRB 456, 460 (1985) (citing *Vulcan-Hart Corp.*, 248 NLRB 1197 (1980), modified in part 642 F.2d 255 (8th Cir. 1981), decision on remand 257 NLRB 979 (1981)). Based on the sequence of events and Haraz' own conduct and actions on May 3, there is no question that her intent was to prevent union activity; Respondent's consistent practice in otherwise allowing employees to bring in food makes it clear that she would not have announced the new "management permission" requirement absent Spencer's protected conduct.

I also find that, by promulgating a new, preauthorization requirement for union-sponsored food at the Denver call center, Haraz unilaterally changed terms and conditions of employment for unit employees. Altering the terms of employees' access to a break room is a material and significant change. See, e.g., *Latino Express, Inc.*, 360 NLRB 911, 920 (2014). It is clear from the record that, prior to May, unit employees regularly brought food into the break room to share and regularly used the break room as a venue for various events, including potlucks and other celebrations, without obtaining permission to do so. Haraz' requirement that, in the future, Spencer gain permission before bringing in food on behalf of the Union, was presented as fait accompli, and no notice or opportunity to bargain was afforded. As such, her denial of non-approved break room access for union activities involving food violated § 8(a)(5).

Order to remove food display and decorations: Employees have the presumptive right under the Act to distribute union literature in employee break rooms. *Cayuga Medical Center*, 365 NLRB No. 170, slip op. (2017) (citations omitted). Thus, an employer may not prohibit such distribution absent a showing of special circumstances that make such a prohibition necessary to maintain production or discipline. See *Our Way, Inc.*, 268 NLRB 394 (1983); *Stoddard-Quirk Mfg.*, 138 NLRB 615 (1962). Moreover, an employer that prohibits union literature while permitting employees to post about non-union activities commits unlawful discrimination, without regard to its motive. *Cayuga Medical Center at Ithaca,* supra (citing *Honeywell, Inc.*,

262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); *Container Corp. of America*, 244 NLRB 318, 318 fn. 2 (1979), enfd. 649 F.2d 1213 (6th Cir. 1981)). Indeed, an employer that allows employees to post union literature violates the Act by removing such notices, or by encouraging its employees to do so. Id. (citations omitted).

In this case, Haraz ordered the removal of pro-union materials from a call center at which numerous other, non-work related materials were permitted and, in some cases, even encouraged. Most significantly, she ordered the removal of the food display set up by Spencer (along with co-stewards Keyser and Proper) which included a large whiteboard with an "Appreciation Day" message from the Union, set off by a binder containing the VIs first collective-bargaining agreement with Respondent. This order violated Sections 8(a)(3) and (1) of the Act, as alleged.

(iii) Stambaugh conduct [¶ 5(ii)]

The General Counsel alleges that, on May 9, Stambaugh engaged in unlawful surveillance by photographing a union flyer posted in the Denver break room. I disagree.

As a general matter, employer surveillance of employees engaging in union activity is unlawful, regardless of whether observed employees are aware of it. *NLRB v. Grower-Shipper Vegetable Assn.*, 122 F.2d 368 (9th Cir. 1941); *Bethlehem Steel Co. v. NLRB*, 120 F.2d 641 (D.C. Cir. 1941). However, as discussed, supra, surveillance of openly conducted union activity, however, generally not considered unlawful. One exception to this general rule is that recording images of employees engaged in open, public union activity (absent proper justification) be found to violate the Act, specifically "because it has a tendency to intimidate" employees who—aware that a record is being made of their conduct—will fear future discipline. *F.W. Woolworth Co.*, 310 NLRB 1197, 1197 (1993); see also *Waco, Inc*., 273 NLRB 746, 747 (1984) ("[p]hotographing lawful, peaceful picketing tends to implant fear of future reprisals") (citations omitted).

In this case, however, there is no evidence that Stambaugh photographed any employee engaged in union conduct. Thus, the rationale for deeming her photography of open union conduct unlawful is absent. As such, I recommend that the allegation stated at ¶ 5(ii) of the complaint be dismissed.

2. Events in Tempe [¶ 5(l)]

a. Facts

In Tempe, Center Manager Jonagan responded to Cummings' email around midday, stating that there was "no activity" at her center, but that she would report if any did occur. Haraz, who was copied on Jonagan's email, asked Jonagan specifically whether was "any food out from the Union in the break room," to which she responded, "no, nothing yet." That afternoon, VI-stewards Molly Glauser (Glauser) and Michelle Caplette (Caplette) brought pizza and cookies into the center. Jonagan approached them as they arrived at the break room and said that she had

been instructed to inform human resources if anyone brought in food that day. (Tr. 739, 802–803, 837–838; Jt. Exhs. 3, 17)[26]

Glauser responded that she had purchased the food and that nobody had reimbursed her for it; she then said, "are you going to make me throw out this food I just bought with my own money?" Jonagan responded that she still had to report to human resources that someone had brought food. She then went into her office and shut the door, during which time Glauser and Caplette continued to set up the food in the break room. (Tr. 741, 804–806, 838)

Jonagan next emailed Haraz, reporting that Glauser and Caplette had brought in pizza, "which they do from time to time." She then reported that Glauser had represented that she had purchased the pizza with her own money, and that "there is no evidence of any union materials or decorations." Copying Cummings and Camp, Haraz responded, "I'm okay with this." Asked by the General Counsel to explain why she was "okay" with the VI's May 3 activity at the Tempe center, as opposed to what took place at the Denver and San Diego centers, Haraz responded, "I don't know." Jonagan testified, however, that Haraz told her that it was fine for the two stewards to bring in the food "personally themselves." (Tr. 266–267, 744; Jt. Exh. 3; GC Exh. 5)[27]

b. Analysis

The General Counsel alleges that, by informing Caplette and Glauser that she was obligated to "report back" if anyone brought food that day to the center and was therefore going to report their conduct, Jonagan unlawfully created an impression of surveillance. I agree.

As the Board has held, an employer violates the Act when it gives employees the impression that "members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Fred'k Wallace & Son, Inc.*, 331 NLRB 914, 914 (2000). Where a supervisor indicates that he is actively monitoring employees' open support for a union, and is doing so at the behest of upper management, he creates the impression of surveillance. See, e.g., *Southern Pride Catfish*, 331 NLRB 618, 622 (2000) (manager openly kept list of which employees wore union T-shirts and informed employees that she was doing so at the direction of management). Such is the case here; Jonagan made clear to the two employees that she was under orders to report any food being brought in on the day the Union had unofficially declared its own "Appreciation Day" for VIs. A reasonable employee in Caplette or Glauser's shoes would certainly construe such remarks to indicate Respondent was

[26] I credit Glauser and Caplette's testimony regarding this interaction. Jonagan (who I generally found to be a credible witness) did not deny telling the two women that she was required to report their conduct; instead, she claimed, rather defensively, a lack of memory about what she had said. (Tr. 745; "I don't recall that. I don't recall that. I'm not saying it didn't happen, I just don't remember, okay?")

[27] Haraz, under questioning by Respondent's counsel, later attempted to put a "spin" on this; she stated that she relied on Jonagan's representation that the two stewards had brought in pizza in the past and that therefore could be considered to have been granted prior "permission" to do so on this occasion. See Tr. 302–303. This self-serving explanation came too late, however. I instead credit her original admission that she could not explain the distinction between two individual stewards bringing in food and "the union" doing so.

wise to their participation in the event and had instructed center management to report them to upper management.

Accordingly I find that, on May 3, 2016, Jonagan created the impression of surveillance in violation of Section 8(a)(1), as alleged in ¶ 5(l) of the complaint.

3. Events in San Diego [¶ 5(j), ¶ 5(i)(1), (2), (3), ¶ 5(gg)]

a. Facts

On the morning of May 3, VI-steward Karen Boyle (Boyle) brought food to the San Diego call center and set it out in the break room, accompanied by a flyer stating:

HAPPY INTERPRETER APPRECIATION DAY!

Wednesday, May 4 is Interpreter Appreciation Day.
Enjoy these treats, a day early, provided by:

ASLIU

Pacific Media Workers Guild Local 3952

ASLIU appreciates the hard work and dedication it takes to be a Video Relay Service Interpreter.

Later that day, San Diego Center Manager Henrik Ek (Ek)[28] discovered the food and sign; he took photographs of them, which he sent to Haraz "as an FYI." Later that day, under orders from Haraz, he brought then-VI and union steward Norma Villegas (Villegas) to his office, where Haraz appeared via video. (Tr. 211, 1974, 1976–1978, 2293, 2465–2466; Jt. Exh. 5)

Haraz began the conversation by saying, "I want to talk to you about the food in the kitchen." Some confusion ensued over whether Villegas was recording the meeting. Haraz then asked who had provided in the food and whether the Union was responsible. Villegas responded that she believed Boyle had brought in the food, but did not know who had paid for it. Haraz then stated, "we're going to need you to remove the food." Villegas stalled, questioning whether would be appropriate for her to do so; Haraz then told Villegas said that, before bringing food into the center, she was required by "policy" to get permission from Center Supervisor Brown. Villegas protested that she had never previously been required to get such permission, and the meeting ended with Haraz accusing Villegas of yelling and being aggressive. Apparently unconvinced that Villegas would in fact remove the food, Haraz ordered Ek to do so. It is undisputed that, following the meeting, Ek placed the break room food out of sight in the refrigerator. (Tr. 1980–1981, 2295–2297)

[28] Ek served as Center Supervisor from May 2015 until approximately May 2016, when he was promoted to Center Manager. (Tr. 1956)

I credit Villegas' account of this meeting, which was extremely detailed.[29] Haraz, by contrast, offered inconsistent and inherently unreliable testimony regarding the meeting, first claiming no memory of having met with Villegas on the day in question and then recalling Villegas being highly aggressive and disrespectful during the meeting, while being unable to remember what was discussed. Compare Tr. 267–269 with Tr. 1598–1599.

b. Analysis

The General Counsel alleges that Ek's actions on May 3 constituted unlawful surveillance (photographing the break room display) and discrimination in violation of Section 8(a)(3) (removing food from the break room). It is further alleged that Haraz, during her video conference with Villegas, committed several independent violations of section 8(a)(1), as well as adverse actions in violation of Section 8(a)(3).

(i) Ek's conduct [¶ 5(j), ¶ 5(gg)]

Break room photography: It is undisputed that, upon discovering Boyle's pro-union display in the break room, Ek photographed it and sent it to his superiors. The General Counsel argues that Ek's conduct constituted unlawful surveillance. I disagree. For the same reasons stated above with respect to Stambaugh's conduct on May 9, I find that Ek's photography of openly conducted union activity, but not the image of any employee partaking in it, does not violate the Act.[30] As such, I recommend that ¶ 5(gg) of the complaint be dismissed.

Removing union-provided food: I agree with the General Counsel that, by removing the food included in Boyle's pro-union display and placing it out of sight in the break room refrigerator, Ek violated Section 8(a)(1). Notably, the display reminded VIs that they were about to experience their first "Interpreter Appreciation Day" as union-represented employees of Respondent. Ek's countermeasure—removing the union-provided food—telegraphed to unit employees that their bargaining representative could not even provide them a snack without Respondent's permission. Thus, inasmuch as the food display acted as a "statement" by the Union, Respondent's excising it from the break room table violated Section 8(a)(1) of the Act. See *Intertape Polymer Corp.*, 360 NLRB 957, 958 (2014) (removal of union literature from break room following filing of representation petition violates the Act) (citation omitted).

Moreover, Ek's act of confiscating food provided by the Union, in light of Respondent's regular custom and practice of permitting employees to share food on an individual basis, was unlawfully discriminatory in violation of Section 8(a)(3). *Cooper Health Systems*, 327 NLRB 1158, 1164 (1999); *Bon Marche*, 308 NLRB 184, 199 (1992); see also *Norton Concrete Company of Longview, Inc.*, 249 NLRB 1270, 1276 (1981) (where employer's change of policy coincides with employees' union activities, an inference is warranted that the change was discriminatorily motivated).

[29] While Villegas, who worked at the San Diego call center from August 2008 until August 2016, did appear passionately supportive of the Union (and correspondingly critical of Respondent), she was not argumentative or evasive on cross examination and generally appeared to make an effort to testify accurately and without exaggeration. (Tr. 2285, 2288)

[30] I reach the same conclusion with respect to the allegation set forth at complaint ¶ 5(jj), and therefore recommend that this allegation be dismissed.

Accordingly, I find that, on May 3, 2016, Respondent, by Ek, violated Sections 8(a)(3) and (1) of the Act by removing union-provided food from the break room as alleged in ¶ 5(j) of the complaint.

(ii) Haraz' conduct

The General Counsel alleges that, by her conduct described above, Haraz engaged in numerous instances of conduct alleged as independent violations of Section 8(a)(1) as well as adverse actions in violation of Section 8(a)(3).

Interrogation: First, it is alleged that, by asking Villegas who had brought in the food and whether the Union was responsible, Haraz unlawfully interrogated her. I agree. Once again, Haraz' rank and the "corner office" setting of this inquiry, combined with the nature of the information she sought, rendered her questioning coercive. Her first query sought to determine who was to blame for the apparent misdeed of bringing in the food, implicitly suggesting that such an individual could be subject to negative consequences for doing so. *Bozzutos, Inc*., 365 NLRB No. 146, slip op. at 1 (2017) (coercive quality of questioning especially high where nature of information sought could result in action against individual employees). Her further attempt to determine whether the Union was involved likewise aimed at to discover protected conduct. See *Far West Fibres, Inc.*, 331 NLRB at 951 (employer's questioning to determine whether union was responsible for food provided to employees amounted to unlawful interrogation).

Unlawful rule: By telling Villegas that she was not allowed to provide food to the San Diego VIs without Respondent's permission, Haraz committed additional unfair labor practices. As noted, it is well established that employees' right to engage in Section 7 conduct may not be abrogated by requiring them to obtain prior authorization before doing so. See *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 4; *In re Saginaw Control and Engineering, Inc.*, 339 NLRB at 553. Moreover, Haraz' rule was clearly promulgated in response to Section 7 activity (the pro-union display) and, by its terms, explicitly restricted such activity. See *Lutheran Heritage Village-Livonia*, 343 NLRB at 646–647. As such, I find that Haraz' orally promulgated rule violated Section 8(a)(1).

I also find that, by promulgating a new, preauthorization requirement for union-sponsored food at the San Diego call center, Haraz unilaterally changed terms and conditions of employment for unit employees. See *Latino Express, Inc.*, 360 NLRB at 920. It is clear from the record that, prior to May, Respondent's employees regularly used the break room as a venue for various events, including potlucks and other celebrations. Haraz' requirement that, in the future, Villegas gain permission before bringing in food was presented as fait accompli, and no notice or opportunity to bargain was afforded. This was a violation of Respondent's duty to bargain under Section 8(a)(5).

Finally, by promulgating a new policy requiring management permission before allowing access to the San Diego break room for union-sponsored activities, Haraz violated Section 8(a)(3). See *Vulcan-Hart Corp.*, supra. Based on the sequence of events and Haraz' own conduct and actions on May 3, there is no question that her intent was to prevent union activity; Respondent's consistent practice in allowing employees to bring in food on an individual basis

unrelated to the union makes it clear that she would not have announced the new "management permission" requirement absent its accompanying pro-union display.

Order to remove union-provided food: For the same reasons that Ek's removal of Boyle's pro-union food display in Denver constituted a coercive and discriminatory act (see supra), Haraz' order that Villegas do so likewise violates Sections 8(a)(3) and (1). See also *Kolkka Tables*, 335 NLRB 844, 849 (2001) (unlawful to order employee to remove union stickers from his toolbox); *St. Luke's Hospital*, 314 NLRB 434, 494 (1994) (unlawful to direct employees to remove pro-union insignia from their uniforms).

Accordingly, I find that, on May 3, 2016, Respondent, by Haraz violated Sections 8(a)(1) of the Act by unlawfully interrogating Villegas as alleged in ¶ 5(i)(1) of the complaint, violated Sections 8(a)(3) and (1) of the Act by ordering the removal of union-provided food from the break room as alleged in ¶ 5(i)(3) of the complaint, and violated Sections 8(a)(3), (5) and (1) of the Act by requiring management permission for union-provided break room food as alleged in ¶ 5(i)(2) of the complaint.

4. Haraz May 4 emailed rules [¶ 5(m)]

The General Counsel alleges that, the day following the Union's "Appreciation Day" events, Haraz unilaterally promulgated, via an email, four overly broad and discriminatory rules. Once again, Respondent's defense is based on its professed belief that article 24 of the CBA governed the conduct of employee-stewards.

a. Facts

Upon learning of Respondent's reaction to the employees' "Appreciation Day" conduct, Yost emailed Haraz. Referring to the VIs regular past practice of bringing in food to share without securing "permission," he demanded that Haraz explain why she had ordered that the union-provided food be removed. The following day, Haraz responded to Yost as follows:

> There would not have been an issue if this was simply a sharing of food during the employee's meal period. The Union did not seek authorization to create this 'celebration.' As we advised the Union steward, all of the balloons and other paraphernalia needed to be removed from the working areas.[31] While we do allow personal effects to be displayed in employee work areas, we do not allow other types of solicitation in such work areas. Small symbols of Union loyalty have been allowed in designated areas; however, larger displays are not acceptable and open the door to people choosing all kinds of reasons to post celebratory balloons, streamers, etc. . . .

[31] This was an apparent reference to Haraz' directive to Spencer regarding the balloon decorations in the Denver call center.

> We are not discontinuing any celebratory practice. We simply are asking that the Union seek authorization for its actions in the workplace so that we can agree upon reasonable limitations on what should or should not be displayed throughout the work environment.

(Jt. Exh. 6) There is no evidence in the record that special circumstances, such as discipline or productivity, were relied on in promulgating the restriction on employees' display of union loyalty to "small symbols. . . in designated areas."[32]

b. Analysis

As a preliminary matter, I do not find any merit to Respondent's claim that, by her email, Haraz was simply attempting to enforce the CBA's access provision. The email, on its face, constitutes Respondent's declaration of permissible versus non-permissible pro-union conduct in the workplace, and makes no mention of the CBA or Respondent's professed contractual entitlement under its article 24 to have shut down the prior day's pro-union activities. As I have previously noted, I found Haraz' testimonial efforts to "integrate" Respondent's claimed reliance on article 24 into her version of the facts unpersuasive; that she made no effort to explain the conspicuous absence of any reference to it in this particular missive is further proof that Respondent's "article 24" defense lacks merit.

Because her statements are alleged to violate multiple provisions of the Act, I will analyze them as potential Section 8(a)(5), (3) and (1) violations, in turn:

8(a)(1) analysis: I agree with the General Counsel that several portions of Haraz' email constitute coercive statements in violation of Section 8(a)(1). They are as follows:

> (i) "While we do allow personal effects to be displayed in employee work areas, we do not allow other types of solicitation in such work areas"

It is well settled that, while an employer may lawfully ban solicitation in working areas during working time, such a ban may not be extended to working areas during non-working time. *Food Services of America, Inc.*, 360 NLRB 1012, 1018 (2017). Haraz' pronouncement bars employees from engaging in the protected activity of union solicitation in work areas during non-working time, such as during breaks and lunch periods. The Board has found that the promulgation and maintenance of such restrictions to be a per se violation of Section 8(a)(1). See, e.g., *Mercury Marine-Division of Brunswick Corp*., 282 NLRB 794, 794–795 (1987).

[32] While there was testimony regarding the need for certain portions of VI workstations (i.e., those appearing on camera during video interpreting) to be free from clutter, Respondent's workplace-wide ban on "non-small" displays of union loyalty was not tailored to apply to such areas.

(ii) "Small symbols of Union loyalty have been allowed in designated areas; however, larger displays are not acceptable"

Haraz' announced restrictions on employees' display of union symbols by size and venue additionally violate the Act. Both the Board and Supreme Court have held that employees have the right to display union insignia while at work, and it is well settled that an employer violates Section 8(a)(1) when, absent special circumstances, it prohibits employees from doing so. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945); *In-N-Out Burger, Inc.,* 365 NLRB No. 39, slip op. at 6 (2017); *Boch Honda*, 362 NLRB No. 83 (2015), enfd. sub nom. *Boch Honda v. NLRB*, 826 F.3d 558 (1st Cir. 2016) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945)); *P.S.K. Supermarkets*, *Inc.,* 349 NLRB 34, 34 (2007); *Ohio Masonic Home*, 205 NLRB 357, 357 (1973), enfd. mem. 511 F.2d 527 (6th Cir. 1975). As Respondent has failed to demonstrate that any "special circumstances" justify limiting employees' pro-union displays to "small symbols . . . in designated areas," the restrictions Haraz announced violate the Act.

(iii) "We simply are asking that the Union seek authorization for its actions in the workplace"

As noted, supra, an employer abrogates its employees' right to engage in Section 7 conduct by requiring them to obtain prior authorization before doing so. See *Enterprise Products Co.*, 265 NLRB 544, 554 (1982) (finding unlawful rule requiring employees to secure employer's permission as precondition to engaging in protected concerted activity on employee's free time and in non-work areas). While Haraz' syntax suggests that Respondent was merely "requesting" that the Union obtain Respondent's permission before engaging in activity on Respondent's property, given the larger context, it is clear that she was in fact reiterating her pronouncements of the day prior, when she had informed individual stewards that they were prohibited from providing food to their coworkers without Respondent's permission. The question is whether a reasonable employee would interpret Haraz' "request" addressed to Yost as an order to that effect. I find that it would.

As the Supreme Court and Board have recognized, determination of whether an employer's statement violates Section 8(a)(1) "must be made in the context of its labor relations setting" and "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580 (1969). As such, the Board does not require that a statement explicitly mandate conduct; telling employees, for example, "you don't need to go to the authorities," has been found to be reasonably construed by employees as an affirmative order not to do so. See *Murray American Energy*, 366 NLRB No. 80, slip op. at 13 (2018) (citing *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993)).

In this case, Haraz unlawfully shut down union-sponsored events in San Diego and Denver, interrogated employees about their involvement in those events and made sure that employees knew their participation in such events was being monitored. By following her actions with a pronouncement that the Union was required to seek authorization for "its actions" in the workplace, Haraz deliberately conflated the Union's own conduct and pro-union actions taken by

individual unit employees. This telegraphed to employees that any pro-union action they wished to take (for example, engaging in a pro-union "button day") would require the Union to seek prior authorization. I find Haraz' highly coercive message violated the Act.

8(a)(3) analysis: There is no question that Haraz' email was promulgated in response to the unit employees' protected Appreciation Day activities the day prior and Yost's effort to hold Respondent to account for its unfair labor practices. As discussed, supra, I do not credit Respondent's explanation that, by her email, she merely sought to enforce the contract's union-access provision. As Respondent has offered no other, legitimate business reason for Haraz' restrictions on protected conduct in the workplace, I find that her pronouncements violated Section 8(a)(3). See *Vulcan-Hart Corp.*, 248 NLRB 1197 (1980) (employer's withdrawal of permission to conduct union activities on its premises for retaliatory reasons violates the Act).

8(a)(5) analysis: It is undisputed that Haraz presented her emailed rules as a fait accompli, affording the Union no notice or opportunity to bargain. However, for a violation of Section 8(a)(5) to be found, her pronouncements must also be found to have altered the status quo. I find that her complete ban on solicitation constituted a change in the status quo in that it deviated from Respondent's own handbook solicitation policy, which only prohibited solicitation during "working time." Moreover, her prior authorization requirement for the Union's "actions in the workplace" and her ban on "larger" pro-union displays marked a change from Respondent's prior tolerance of such displays, even in employee work areas. I therefore find that her email violated Section 8(a)(5) as alleged.

H. Additional restrictions on call center union activity during the Summer of 2016

1. Denver [¶ 5(o); ¶ 5(p)]

a. Facts

On June 6 (approximately a month following the events surrounding Interpreter Appreciation Day), VI-steward Proper placed strawberries on one of the tables in the Denver break room, along with a note that said "Happy Monday from ASL/IU." Veith noticed the berries, and, because of the pro-union sign that accompanied them, reported the incident to her supervisor, Stambaugh. (Tr. 1148, 1258–1259) Two days later, Veith sent the following email to VI-steward Keyser:

> Hey Liz!
>
> First, I want to say thank you for taking the time to recognize the VR as interpreters Monday. The strawberries were a sweet and fresh idea.
>
> Second, I want to be sure we are both on the same page. It's really important to me to honor the CBA, and by extension respect all the VI's who choose to work in a Union Center. Article 24 of the CBA says "*Union staff representative(s) shall be allowed reasonable access to non-production areas of call centers covered*

> *by this agreement after coordinating with the Call Center Manager*." The key words for me are "after coordinating with the Call Center Manager." Moving forward, please be sure to connect with me about any treats or other efforts for the VIs beforehand.

(Jt. Exh. 9) Keyser responded with an email indicating that she read article 24 very differently and wanted to meet with Veith and Proper to get "on the same page." Id. Veith responded, indicating she had no authority to negotiate over the topic and expected Proper to comply with the "clear boundary" she had set. Id.

On approximately June 15, Proper and Veith did, in fact, discuss the strawberries incident. During the discussion, Proper tried unsuccessfully to convince Veith that article 24 did not apply to her, because she was not a "Union staff representative"; Veith maintained that the crux of the article was that Proper was not to "bring in things without coordinating with the Center Manager and having her approval." When Proper continued to disagree, Veith ended the conversation, stating that she was following her understanding of the contract and any disagreement would have to be worked out at a higher level. (Tr. 1151–1152)

b. Analysis

The General Counsel argues that, by her June 8 and 15 emails, Veith unilaterally promulgated, and Respondent has since maintained, two overly-broad and discriminatory rules: one requiring stewards to give management prior notice before bringing in "any treats or other efforts for the VIs" and another specifically requiring Proper to obtain Veith's approval before bringing "things" into the Denver call center. I agree.

Notably, Veith's email stands as the first time management explicitly cited article 24 as the rationale for restricting stewards' union activity. Merely inserting text from the CBA into her email, however, does not sanitize Veith's unlawful rules, which are far broader in scope than the contract's union-access provision, even assuming it applied. I therefore find that, by her edicts, Veith continued Respondent's attack on pro-union displays, in violation of Sections 8(a)(3) and (1).[33] Moreover, inasmuch as Respondent had previously condoned VIs bringing food to the Denver call center to share with each other, Veith's pronouncements—presented as a fait accompli—changed terms and conditions of unit employees they additionally violated Section 8(a)(5) as alleged.

2. San Diego [¶ 5(kk), ¶ 5(hh)]

a. Facts

On August 17, Boyle posted a union flyer on the union bulletin board above a box of doughnuts in the San Diego break room. On top of the lid to the doughnut box, she handwrote, "Look—something new from ASLIU" with arrows pointing up towards the flyer. (Tr. 2470–2472) Ek discovered the doughnuts and flyer; as he had in May, he photographed the display

[33] The coercive nature of pre-authorization requirements has been discussed several times throughout this opinion, and the same reasoning applies here.

and sent his photographs to Haraz and Stambaugh. After consulting with Stambaugh, he then sent Boyle an email strikingly similar to Veith's email to Proper two months earlier:

> First, I want to say thank you for taking the time to recognize the VRS interpreters today! The donuts were a sweet idea.
>
> Second, I want to be sure we are both on the same page. It's really important to me to honor the CBA, and by extension respect all the VI's who choose to work in a Union center. Article 24 of the CBA says "Union staff representative(s) shall be allowed reasonable access to non-production areas of call centers covered by this Agreement after coordinating with the Call Center Manager." The key words for me are "after coordinating with the Call Center Manager." Moving forward, please be sure to connect with me about any treats or other efforts for the VI's beforehand.

Ek admitted that, other than this email, he had never directed any other VI to provide prior notice before bringing any "treats or other efforts" for their coworkers. The following day, Boyle responded to Ek's email, disputing that article 24 applied to her, as she was not "Union staff" but was merely an employee of Respondent. (GC Exh. 100; Jt. Exh. 10; Tr. 1999–2002, 2473) There is no indication in the record that Ek responded to this email.

b. Analysis

The General Counsel alleges that Ek's photography constituted unlawful surveillance. Because there is no evidence that his recordation included the image of any employee (see § G.1.b(iii), supra), I disagree and therefore recommend that ¶ 5(kk) of the complaint be dismissed. With respect to the rule requiring stewards to contact him before bringing in any "treats" or "other efforts" for employees, I find that it violates the Act on the same rationale as did Veith's June 8 and 15 emails.

I. Rules regarding Tempe employee break room

Employees generally testified that it was common for them to leave non-work related materials in the Tempe break room, including solicitations for various items, including Girl Scout cookies, chocolate bars and, as Caplette testified, "candles, lots of candles."[34] When Sonoma Fragassi (Fragassi) began as Acting Center Manager in 2016, she specifically asked Operations General Manager Stambaugh whether a donation box for a fundraiser was permitted in the break room and was told that it was. Caplette testified that she also regularly left union announcements on the tables in the break room, as well as on the union bulletin board. It is undisputed that historically, no prior permission was required to leave reading material in the break room. Nor is there any credible evidence that—prior to November 14—management ever

[34] This is consistent with testimony by VIs working in other call centers, who testified that it was not uncommon for VIs to sell items such items via a sign-up sheet in those centers' break rooms. (Tr. 601, 613, 809–811, 2476)

removed union literature from the break room. (Tr. 354–355, 357, 490–491, 496, 890, 889, 898–899)

1. Fragassi November 14 rule [¶ 5(z)(1), ¶ 5(aa)]

The General Counsel alleges several violations based on a single order given by then-Tempe Center Manager Fragassi. Specifically, she is alleged to have directed VI-steward Caplette to remove union flyers from the center's break room. Fragassi testified that Caplette was an active and vocal union steward, who frequently questioned her authority as a manager and brought an "excessive" number of (sometimes illegitimate) complaints on behalf of her coworkers. (Tr. 527, 531)

As background, Respondent maintains a non-solicitation/non-distribution policy which states:

> Employees of Purple may not solicit or distribute literature during "working time" for any purpose. Employees of the Company may not distribute literature in "working areas" at any time for any purpose. Working time includes the working time of both the employee doing the soliciting or distributing and the employee to whom the soliciting or distributing is being directed. Working time does not include meal periods, or any other specific periods during the workday when employees are properly not engaged in performing their work assignments.

(Jt. Exhs. 100; GC Exh. 2 at 32) According to Haraz, "working areas" under the policy does not cover employee break rooms. (Tr. 292)

a. Facts

On November 14, VI-steward Caplette arrived early for her shift in order to post an announcement from the Union titled, "Pacific Media Workers Guild Complaint and Notice of Hearing." She posted this document on the union bulletin board in the employee break room and additionally placed copies on the tables in the break room. Fragassi discovered the flyers and brought them to the attention of Stambaugh,[35] who directed Fragassi to remove them. During her lunch break later that day, Caplette stuck her head in Fragassi's office to chat. At the end of their conversation, Fragassi informed Caplette that she had been directed to ask her to remove the announcements from the tables in the break room. Caplette responded that she would not do so, because she believed she was entitled to leave union materials in the break room pursuant to a prior NLRB settlement. (Tr. 354, 470–472, 477, 872, 874–876; GC Exh. 11)[36]

[35] It is undisputed that this was the first time that Fragassi had ever reported to Stambaugh the fact that materials had been left in the break room. (Tr. 419)

[36] I credit Caplette's version of this conversation, which was quite detailed, rather that of Fragassi, who related a convoluted version of events in which she never tried to get Caplette to remove the fliers. She appeared particularly uncomfortable during this part of her testimony, leading me to believe she was attempting to 'edit' herself out of incident. (Tr. 482–483)

At some point during the day, Fragassi removed the flyers, except for the one posted on the union bulletin board. On the day in question, there were other non-work related items left in the break room—a pizza advertisement and some magazines—that she left in place. Caplette testified that, following this incident, she contacted Haraz, who admitted that, pursuant to the prior settlement, the Union was permitted to place announcements in the break room and that they should not have been touched. (Tr. 478–481, 534, 876–880; 886–887; GC Exh. 23)

b. Analysis

The General Counsel alleges that, by relaying the order that Caplette remove the union announcement from the tables in the break room, Fragassi violated both Sections 8(a)(1) and (3) by creating, in effect, two overly broad and discriminatory rules: one prohibiting its employees from placing union-related materials in the break room,[37] and another requiring union stewards, such as Caplette, to remove such materials. It is also alleged that both aspects of her order violated Section 8(a)(3), in that they constituted a selective enforcement of Respondent's above-referenced non-solicitation policy. Finally, the General Counsel argues that, by resorting to removing the flyers herself, Fragassi violated Sections 8(a)(3) and (1) of the Act.

With respect to her relaying the order to remove the announcements, I find, on the same authority discussed, supra, with respect to Haraz' order to remove balloons from the San Diego call center, that Fragassi's conduct violated Sections 8(a)(3) and (1). Likewise, her removal of the announcements, like Ek's act of confiscating food from the San Diego break room, in light of Respondent's past custom and practice of permitting employees to leave various non-business, non-union related literature in the break room, was unlawfully discriminatory in violation of Section 8(a)(3). (See cases cited supra at § G.3.b(i)) I also find that, disparately applying Respondent's no-solicitation policy, Fragassi additionally violated the Act. See *Pay'N Save Corp.*, 247 NLRB 1346 (1980), enfd. 641 F.2d 697 (9th Cir. 1981).

Finally, because Respondent—pursuant to a Board settlement agreement—had a prior practice of allowing union announcements on its break room tables and abruptly changed this practice, Fragassi's rules banning union materials and requirement that employee-stewards remove such materials additionally constituted an unlawful unilateral change in violation of Section 8(a)(5), as alleged. See *Latino Express, Inc.*, 360 NLRB at 920.

2. Fragassi March 9, 2017 rule [¶ 5(cc)]

a. Facts

On March 9, 2017, Caplette again came to work early to place union materials in the break room. Once again, she posted one copy on the bulletin board and left additional copies on the break room table. That afternoon, Fragassi discovered the flyers, recognized them as union

[37] This portion of the "rule" is also alleged as an unlawful unilateral change.

announcements and removed them from the table.[38] Later, when Caplette arrived at the break room to eat lunch, she noticed that the table announcements were gone. Caplette confronted Fragassi, stating that she had left announcements on the table and that they were allowed to be there. Fragassi insisted that the announcements were not allowed to be anywhere in the break room except on the union bulletin board. Later that day, Fragassi reported what had happened to Stambaugh, who (after consulting with Haraz), instructed Fragassi to return the fliers to the break room, which she did. Fragassi testified that, after she returned the fliers, Caplette stopped by her office and acknowledged that she had done so. (Tr. 389, 484–485, 487–490, 509–512, 890–892; GC Exh. 13)

b. Analysis

In light of Respondent's past custom and practice of permitting employees to leave various non-business, non-union related literature in the break room, Fragassi's removal of the union announcements—like Ek's removal of union-provided food—was both coercive in violation of Section 8(a)(1) and unlawfully discriminatory in violation of Section 8(a)(3). (See cases cited supra at § G.3.b(i)) Likewise, her directive that union materials were not allowed in the break room (except on the bulletin board) violated Sections 8(a)(1) and (3), as did her prior ban on such items. (See cases cited supra at § G.1.b(ii)) Finally, in light of Respondent's prior practice, as admitted by Haraz, of allowing union announcements on its break room tables, Fragassi's ban on union materials constituted an unlawful unilateral change in violation of Section 8(a)(5). See *Latino Express, Inc.*, supra.

Nor do I find that Fragassi's actions in returning the fliers in effect remedied any unfair labor practices pursuant to *Passavant Memorial Area Hospital*. See 237 NLRB 138 (1978). To meet the Board's standard in this regard, a repudiation must, at a minimum, be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Murray American Energy*, 366 NLRB No. 80, slip op. at 11 fn. 13 (citing cases and discussing additional requirements for effective repudiation). Suffice to say that, other than being "timely," Fragassi's conduct in replacing the union announcements wholly failed to meet the Board's standard.

3. March 23, 2017 rule [¶ 5(dd)]

The General Counsel alleges that, at the Tempe call center since about March 23, 2017, Respondent has maintained overly-broad and discriminatory rules (a) prohibiting employees from leaving materials related to the Union anywhere except on the Union bulletin board at the Tempe call center; and (b) requiring its employees to notify Respondent in advance and secure authorization before leaving materials related to the Union unattended in that center's break room.

In support of this allegation, the General Counsel relies on affidavit statements made by Stambaugh to the effect that Respondent "has a practice of keeping break rooms at its centers

[38] Fragassi testified that she discovered only a single copy of the announcement on the table, which she then posted on the union bulletin board, although there was already a copy posted there. I do not credit this testimony, which was awkward and halting; it appeared to be another effort by Fragassi to 'sanitize' the facts.

clear of clutter" and further that "managers remove materials that are left unattended in the break room unless [it] has been notified about those material and authorized them to be left unattended." (GC Exh. 7) There is no evidence, however, that any employee was made aware of this "practice" ; as such, even to the extent it may constitute a reliable admission against interest, I agree with Respondent that it was not shown to have been communicated to any employee or maintained as a rule governing employee conduct. Accordingly, I recommend that ¶ 5(dd) of the complaint be dismissed.

J. Miscellaneous independent 8(a)(1) allegations

1. Jonagan January 7 disparagement [¶ 5(h)]

The General Counsel alleges that, in January 2016, Jonagan unlawfully disparaged the Union in violation of Section 8(a)(1), by telling employees that their discipline was due to the parties' CBA.[39]

a. Facts

In support of this allegation, the General Counsel relies on the testimony of former Center Manager Jonagan, who testified that, at some point after July 2015, she referenced the parties' newly negotiated CBA in issuing disciplinary actions to VIs. As Jonagan testified, these situations arose when she was required to follow the contract and therefore issued discipline for what she had previously considered de minimis performance lapses. On these occasions, she informed the employee in question that her "hands were tied" and that she was required to follow the contract. Contrary to the General Counsel's characterization, however, I do not believe that Jonagan admitted to telling a particular VI that she was being disciplined because of the parties' contract; Jonagan was generally credible, and my impression was that, under 611(c) examination, she became confused by the questioning but ultimately denied doing so. (Tr. 759–762)[40]

b. Analysis

An employer unlawfully disparages a union, in violation of Section 8(a)(1), by taking adverse action against its employees and falsely blaming that action on the union. See *Webco Industries, Inc.*, 327 NLRB 172, 173 (1998) (employer violated Section 8(a)(1) by telling employees that union was responsible for its unlawful discipline of employees). The rationale for finding such statements coercive is straight forward: blaming the union for discipline telegraphs to employees that "union representation results in damage to their terms and conditions of employment." Id.

[39] This conduct is also alleged as a unilateral change in violation of Section 8(a)(5).

[40] The only employee witness who offered similar testimony was former VI Molly Glauser (Glauser), who testified that, at some point between January 2016 and May 2017, Jonagan issued her a discipline and said that she "personally" would not have done so, because her underperformance was minimal. (Tr. 811–813) I found this testimony far too vague to be credited.

In this case, the General Counsel has failed to establish that Jonagan "blamed" the Union for any particular discipline. To the extent that the record indicates that she told employees that she was required to follow the contract, this was a truthful statement and not one casting any particular aspersion on the Union. Because the General Counsel did not establish that Jonagan specifically blamed a specific disciplinary action on the Union, I do not find that she unlawfully disparaged the Union or otherwise violated the Act as alleged. I therefore recommend that the allegation set forth in ¶ 5(h) of the complaint be dismissed.

2. Stambaugh May 2016 disparagement [¶ 5(n)]

a. Facts

The General Counsel alleges that, in a May conversation with then-VI Mary Jane Moore ("Moore"), Stambaugh unlawfully disparaged the Union.

According to Moore, the conversation took place in the Tempe call center in May or June of 2016.[41] The two women, who already knew each other, had a frank discussion in which Moore complained about Respondent's minimum productivity requirements for VIs. In response, Stambaugh indicated that the requirements had been negotiated with the Union. When Moore suggested that the unit employees had not wanted such requirements in the contract, Stambaugh responded, "the Union hasn't done anything for you." (Tr. 544–547)[42]

b. Analysis

It is well established that an employer that engages in a plan of denigrating or disparaging a union with the goal of undermining employee support for the union violates Section 8(a)(1) of the Act. See, e.g., *Regency House of Wallingford, Inc.*, 356 NLRB 563, 575 (2011) (citing *Davis Electric Wallingford Corp.*, 318 NLRB 375 (1995); *Albert Einstein Medical Center*, 316 NLRB 1040 (1995); *J.L.M., Inc.,* 312 NLRB 304 (1993)). Words of disparagement alone concerning a union, its officials or supporters are insufficient for finding a violation of Section 8(a)(1). *Sears Roebuck Co.*, 305 NLRB 193 (1991). In this case, I find that Stambaugh's comment rose beyond mere words of disparagement; she suggested to Moore that the contract the Union had negotiated for the unit had not improved her working conditions. By doing so, she denigrated the Union in a manner that impugned its representational abilities and implicitly threatened that continued representation by the Union would be futile. Such a comment violates the Act. See *Regency House of Wallingford, Inc.*, 356 NLRB at 567–568.

[41] Stambaugh worked at the Tempe location during the summer, covering for then-Center Manager Jonagan, who was on leave. (Tr. 405, 538)

[42] I credit Moore's version of the conversation. I note that she was an especially credible witness, who even took care to correct a minor, inconsequential misstatement in her testimony before leaving the stand. (Tr. 556) Stambaugh, by contrast, was defensive when questioned by counsel for the General Counsel and gave somewhat rehearsed testimony when questioned by Respondent's counsel. Most significantly, she did not deny the conversation in question, but instead categorically denied ever telling "employees" in the Tempe call center that "the union had not done anything for them." (Tr. 405)

3. Thresher May through November 2016 conduct [¶ 5(y), 5(jj), 5(ll)]

Terra Thresher (Thresher) worked as a center supervisor at the San Diego call center from early July 2016 through the end of that year. Previously, she had worked as a VI at the center, during which time she was friendly with another San Diego VI, Hannah Mattix (Mattix), with whom she discussed the Union from time to time. (Tr. 1727–1728)

On November 1, VI Delia D'Angelo (D'Angelo) observed what she recognized to be Thresher's "Facebook" page open on a shared work computer. (Tr. 2057–2058) D'Angelo took numerous pictures of the computer screen, which showed messages between Thresher and Mattix. While the precise dates of each part of their messages is unclear, based on the record as a whole, I find that they were in fact were sent and received by Mattix and then-supervisor Thresher, beginning in August 2016.[43] The exchanges consist of three conversations, each of which I will address in turn.

a. Exchange #1 (union literature) [¶ 5(y)(3), ¶ 5(y)(4) and ¶ 5(y)(5)]

The first exchange concerned union literature:

MATTIX	THRESHER
The union sent around some statement about the firings. It was so poorly written and filled with such political rhetoric *eye roll	
	Was it on orange paper? What did the paper say?
No, it was the usual white paper with the logo, it covered something about a mediation that had happened back in april I'll send you a picture, is that legal?	
	what do you mean legal?
I mean I can send you, as my manager, a copy, right?	
	Ya you can send me whatever you want

[43] Thresher initially admitted to sending the messages at issue, but later attempted to disavow certain of them, positing that perhaps someone else could have sent them posing as her. Respondent, however, provided no evidence to support such a theory. Current employee Mattix, who was visibly uncomfortable during her testimony, appeared to feign a lack of specific recollection regarding the exchange. Based on her overall demeanor, I cannot credit her lack of memory as to whether she participated in the documented conversation.

Sweet!

I will show it to the peeps above me but I will not tell them where I got it

(GC Exh. 74)

b. Analysis

The General Counsel alleges that, during this exchange, Thresher unlawfully interrogated Mattix (i.e., "what did the paper say?"), solicited her to report on the union activities of her coworkers (by inviting her to forward her the union literature they discussed) and gave Thresher the impression of surveillance (by showing interest in the literature).

Interrogation: It is well settled that interrogations do not per se violate Section 8(a)(1). "To fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference." *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980), and cited cases. Where an employee, such as Mattix, has already made her anti-union views known, the potential for her to be restrained or coerced would appear, at first blush, to be less likely. That said, Section 7 necessarily protects an employee's right to choose the degree to which she wishes to express support for, or opposition to, union representation. See, e.g., *Gonzales Packing Co.*, 304 NLRB 805, 816 (1991) (supervisor violated 8(a)(1) by approaching employees, some of whom had previously voiced anti-union sentiments, and asking them to wear 'Vote No' buttons).

The question in this case is whether Thresher, by pressing Mattix to disclose the contents of the union literature, was inquiring into a level of detail that Mattix had not voluntarily disclosed. I find that she did. Mattix started the conversation by reporting that she had seen a "statement" by the Union and then making fun of its quality and tone. Thresher's point-blank response—"what did it say?"—certainly demanded more information than Mattix had offered. Indeed, Mattix' concern over the propriety of showing Thresher a copy of the statement indicates that she had not previously shared such information with her. As such, I find that Thresher's inquiry pressing for the contents of the union literature constituted an unlawful interrogation.

Solicitation to surveil coworkers: I additionally find that, by giving Mattix "permission" to forward the union statement (which she promised to relay to upper management), and furthermore by encouraging her to send her "whatever" she wanted, Thresher unlawfully solicited Mattix to report on the union activities of her coworkers. While Thresher did not explicitly refer to information regarding union activity, this was hardly necessary, considering that was the very subject they were discussing. See *T-West Sales & Service, Inc.*, 346 NLRB 118 (2005) (unlawful solicitation to ask employees to report if they heard anything about union organizing); *Maple Grove Health Care Center*, 330 NLRB 775, 784 (2000) (unlawful solicitation to ask employee if he had heard anything about union organizing and if he would tell him if he had).

Impression of surveillance: "Soliciting employees to report on the union activity of others necessarily creates the impression of unlawful surveillance and is violative of Section 8(a)(1)." *In re MTR Sheet Metal, Inc.*, 337 NLRB 713 (2002) (telling employee to "keep his eye" on a

coworker creates impression of surveillance) (citing *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001)). As such, I find that, by soliciting Mattix to send her evidence of her coworkers' union conduct, Thresher unlawfully created the impression of surveillance as alleged.

c. Exchange #2 (union statement) [¶ 5(y)(6), ¶ 5(y)(8)]

Following their first conversation, Mattix did in fact email Thresher a union flyer which she, in turn, forwarded to upper management three days later (without disclosing Mattix as the source).[44] The two women then had another Facebook message exchange, which included a discussion about the flyer:

MATTIX	THRESHER
Right????? It was spectacularly whining and self gratifying Instead of saying "After rewarding bad behavior for too long, the employees finally got their just recompense."	
	I agree! AND wayne and robert[45] were talking about how much they hated the union and they blamed the union for the contract in the[46]
[illegible]	
	and they are trying to use scare tactects [sic] to get people on their side It makes me sad And why are they passing out info while at work anyways???
The discipline type, self monitoring, the ridiculous wording "which is just about all the discipline meted out… I thought that wasn't allowed?? Unless Karen was off the clock.	
	It is not allowed to conduct

[44] I base this finding on Mattix' reference in this conversation to the specific phrase, "all the discipline meted out," which is mentioned in the flyer she admittedly sent Thresher.

[45] According to Thresher, "Wayne" and "Robert" were San Diego VIs who she overheard making anti-union remarks during the time she had worked as a VI at that call center. (Tr. 1750–1751)

[46] D'Angelo's photograph of this portion of the exchange cut off mid-sentence, leaving it unclear whether Thresher disclosed how she had learned of the two employees' sentiments about the Union.

union business on work place property

And she used the printer too

ugh… Wish I could have caught her

(Tr. 2145, 2470–2471; GC Exh. 73, 74)

d. Analysis

The General Counsel alleges that Thresher's reference to "Wayne" and "Robert" created the impression of surveillance of employees' union sentiments. It is further alleged that her statement about conducting union business on "work place property" constitutes an overly broad and discriminatory work rule, as well as a violation of Section 8(a)(3) of the Act. Finally, it is alleged Thresher's expressed regret at not having "caught" an employee violating that rule constituted a threat of unspecified reprisals for using Respondent's printer for union activities.

Impression of surveillance: The Board has found that the impression of surveillance is created where an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information. *North Hills Office Services*, 346 NLRB 1099, 1103 (2006). The coercive quality of such an 'unsourced' statement is based on its tendency to cause employees "to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring." Id.

Here, the record establishes that Thresher informed Mattix that she knew that two San Diego VI's had complained about the Union. I do not find, however, that the General Counsel has demonstrated that her statement qualified as the type tending to cause an employee to speculate that it was obtained through employer monitoring. The record indicates that Thresher actually learned, before she was promoted, that the employees in question were opposed to the Union, something that she may have made clear in the portion of her email message that was not introduced into evidence. Under the circumstances, I cannot assume that Thresher made an 'unsourced' statement of knowledge about employees' union sentiments of the type that would create an impression of surveillance. Accordingly, I recommend that complaint paragraph 5(y)(6) be dismissed.

Overly broad/discriminatory rule: Directives prohibiting employees from conducting union business anywhere on workplace property, such as the rule advanced in Thrasher's directive to Mattix, are unlawfully overbroad. *Brunswick Corp.*, 282 NLRB at 795.[47] Moreover, inasmuch as her pronouncement was a direct response to Mattix' report that employees had been "passing out" union literature at work, it constitutes a discriminatory prohibition. Finally, because the record demonstrates that employee-stewards regularly conducted union business, such as

[47] I disagree with Respondent that Thresher's statement to Mattix was not an unlawful rule; it was not a piece of "advice" to Mattix, but rather a blanket statement that employees (such as the one to whom she referred) were forbidden from conducting any union business at work. Cf. *Food Services of America, Inc.*, 360 NLRB 1012, 1016, fn. 11 (2014) (no unlawful rule based on supervisor advising employee to stay away from recently discharged employee).

Weingarten representation, "on work place property," Thresher's directive constitutes an unlawful unilateral change—presented as a fait accompli—to employees' working conditions.

Accordingly, I find that, by directing that employees were forbidden to conduct union business anywhere "on work place property," Thresher violated Sections 8(a)(1), (3) and (5) as alleged in the complaint.

Threat of unspecified reprisals: In assessing an alleged threat, the Board uses an objective standard: whether the statement would tend to coerce a reasonable employee. *Hendrickson USA, LLC*, 366 NLRB No. 7, slip op. at 5 (2018). The language of the alleged statement does not need to be explicit to make it a threat, and if so, is assessed in the totality of circumstances. Id. In this case, Thresher's expressed regret at not having "caught" an employee conducting union business at work clearly signaled that she intended to punish such conduct and therefore constitutes a threat of unspecified reprisals.

e. Exchange 3 (referral to NLRB) [¶ 5(y)(1), (2)]

In the third conversation, Mattix inquires about conditions at the call center where Thresher then worked:

MATTIX	THRESHER
How's the atmosphere there?	
	Not as much union here lol National labor relations board is a good way to check out how to deunionize

(GC Exh. 74)

f. Analysis

The General Counsel alleges that Thresher's comment amounts to unlawful assistance to employees in helping reject a collective-bargaining representative. (See ¶ 5(y)(1), (2)) I disagree. While it is clear that Thrasher referred Mattix to the Board for information about decertifying the Union, this alone does not amount to unlawful assistance. An employer may lawfully provide neutral information to employees regarding their right to withdraw their union support, provided that the employer offers no assistance, makes no attempt to monitor whether employees do so, and does not create an atmosphere "wherein employees would tend to feel peril in refraining from [withdrawing]." *Mohawk Industries*, 334 NLRB 1170, 1170–1171 (2001) (quoting *Vestal Nursing Center*, 328 NLRB 87, 101 (1999)); see also *Lee Lumber and Bldg. Material*, 306 NLRB 408, 410 (1992) (manager "did not unlawfully provide assistance by advising the employees, in general terms, about how to file the [decertification] petition"). In this instance, I do not find that Thresher's referring Mattix—who had already expressed her anti-union sentiments—to the appropriate government agency for information on decertification did not create an atmosphere in which a reasonable employee in Mattix place would fear retribution for not pursuing decertification.

Accordingly, I recommend that the complaint allegations at ¶ 5(y)(1), (2) be dismissed.[48]

K. Respondent's handbook rules[49]

The Board has long recognized that work rules, to the extent they touch upon protected Section 7 conduct, have the potential to chill employees in their exercise of rights guaranteed by the Act. The coercive effect of some rules is obvious; a rule will be found unlawful, for example, if it explicitly restricts Section 7 conduct. Moreover, even a facially neutral rule is unlawful where it: (a) was promulgated in response Section 7-protected conduct; or (b) has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Finally, facially neutral rules not promulgated in response to, or applied to restrict, protected activities may nonetheless be found coercive and therefore unlawful where they, "when reasonably interpreted, would potentially interfere with Section 7 rights." *The Boeing Co.*, 365 NLRB No. 154, slip op. at 4 (2017).

Until recently, Board precedent dictated that the lawfulness of this third category of should turn on whether an employee would reasonably understand the rule in question to prohibit Section 7-protected conduct, taking into consideration the "surrounding circumstances" of which such an employee would be aware.[50] Following the hearing in this case, however, a majority of the Board rejected this standard, adopting instead a new, modified test for such rules. In the Board's recent *Boeing* decision, which dealt with a ban on employee photography and video in the workplace, the majority stated that henceforth, it would explicitly balance the employer's proffered business justification for a rule against the "nature and extent" of its "potential impact on "NLRA rights." 365 NLRB No. 154, slip op. at 4, 7 (2017). In applying its new test, the Board stated, it intends to take into account "different industries and work settings" as well as "specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity." Id., slip op. at 2. Notably, application of the Board's new test is not required to find a rule unlawful where it is shown to either (a) explicitly restrict Section 7 conduct; (b) have been promulgated in response Section 7-protected conduct; or (b) have been applied to restrict the exercise of Section 7 rights.

In this case, the General Counsel alleges that Respondent has promulgated, maintained and/or enforced several unlawful employee handbook rules, each of which is addressed below. At hearing, Respondent stipulated that it has maintained each of the challenged rules in its

[48] The complaint contains an allegation that, during their Facebook conversations, Thrasher promised Mattix benefits (see ¶ 5(y)(9)); the record, however, contains no evidence in support of this allegation. Accordingly, I recommend that it be dismissed. The General Counsel also alleges at complaint ¶ 5(ll), that Thasher unlawfully surveilled employees' union conduct on October 21, 2016, by taking pictures of donuts that VI-steward Boyle had brought for employees and e-mailed them to Haraz and Stambaugh. (See GC Exh. 77) I recommend this allegation be dismissed, as it is another example of recording of openly conducted union activity sans employees.

[49] On December 19, 2017, the General Counsel moved to withdraw the rule alleged in ¶ 5(ff) of the Complaint, as well as portions of the rules alleged in ¶ 5(a) and ¶ 5(e) of the complaint. That unopposed motion is granted.

[50] See, e.g., *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 1 fn. 2 (2017); *Roomstores of Phoenix, LLC*, 357 NLRB 1690, 1690 fn. 3 (2011).

nationwide employee handbook (the handbook), that is made available to employees via its intranet site. It is also undisputed that Respondent requires its employees to sign an "Acknowledgement of Receipt of the Employee Handbook" stating that they understand and agree with the rules contained therein. (Jt. Exh. 24; Tr. 288–289)

1. "Confidential" disciplinary action reports [¶ 5(g)]

CGC alleges that Respondent unlawfully labels as "Confidential" its employees' Disciplinary Action Reports (i.e., the forms Respondent uses to document employee discipline), in violation of Section 8(a)(1).

a. Facts

At hearing, the parties stipulated that, "[s]ince at least January 1, 2016, the Disciplinary Action Report that Purple has requested employees sign contains the word 'Confidential.'" (Jt. Exh. 99, 100) Indeed, the disciplinary form is itself captioned in bold, capital letters, "CONFIDENTIAL DISCIPLINARY ACTION REPORT." (See Jt. Exh. 99, Exh. A)

b. Analysis

Discipline constitutes an "undeniably significant" term of employment. *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). The Board recognizes employees' correspondingly important Section 7 right to discuss the circumstances of their discipline with each other. *Verizon Wireless*, 349 NLRB 640, 658 (2007) ("[i]t is important that employees be permitted to communicate the circumstances of their discipline to their co-workers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense"). That said, a restriction on employee discussion of discipline may, under appropriate circumstances, be lawful. The test is whether, under the circumstances, employees' interests in discussing their discipline "outweigh" their employer's "asserted legitimate and substantial business justifications." *Boeing Co.*, 365 NLRB No. 154, slip op. at 10 (citing *Caesar's Palace*, 336 NLRB at 272; *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976)).

Accordingly, an employer violates Section 8(a)(1) when it prohibits employees from speaking with coworkers about discipline, absent a legitimate and substantial business justification for doing so. See *Carney Hospital*, 350 NLRB 627, 644 (2007); see also *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 7 (2014); *SNE Enterprises*, 347 NLRB 472, 491–492 (2006); *Caesar's Palace*, supra. In this case, by captioning every disciplinary notice as "confidential," Respondent clearly imparts to its employees that the contents of such reports are not to be discussed, period. I also find that the forms would be reasonably construed by employees to constitute a prohibition on any discussion of the circumstances of their discipline. See *Philips Electronics North America*, 361 NLRB No. 16, slip op. at 3 (2014) (even in the absence of a written policy, an employer violates the Act by maintaining language in disciplinary notice that, reasonably construed, constitutes a prohibition on employees' discussing their discipline).

Against this common-sense interpretation, Respondent argues that a reasonable employee, rather than feel constrained by being issued a "confidential" discipline, would reasonably assume the designation, rather than constrain his own communications, to offer him the benevolent protection of safeguarding his discipline from disclosure by "Purple personnel or others." Such an employee would presumably believe that Respondent was guaranteeing to never disclose the contents of any disciplinary notice (for example, in defense of a grievance, Board charge or unemployment claim). Frankly, this is a bridge too far. Instead, I find that a reasonable employee—having been handed a document labeled "CONFIDENTIAL DISCIPLINARY ACTION REPORT"—would logically understand that the subject of his discipline was to be kept under wraps.[51]

The question remains whether Respondent's incursion of Section 7 rights is justified by business necessity. I find that it is not. Respondent's confidentiality rule is not tailored to address privacy and safety issues that might warrant curtailing discussion during specific investigation of alleged employee wrongdoing, nor did Respondent present any evidence of any such business justification for its ban on discussing discipline. Rather, by its post-hearing brief, it categorically claims—without supporting record evidence—that it faces potential liability for failing to secure its employees' disciplinary information from disclosure "by its managers and other employees who learn the information in confidence." (R. Br. at 143) Purely speculative, after-the-fact concerns over confidentiality cannot justify divesting employees of their essential and protected right to discuss their discipline with each other. I therefore find that Respondent has failed to articulate or establish a substantial business justification for its significant constraint on its employees' Section 7 rights.

Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act by labeling employee disciplinary notices as confidential.

2. Confidentiality of personnel files [¶ 5(e), [¶ 5(f)]

a. Facts

At hearing, the parties stipulated that, since at least September 29, 2016, Respondent Purple has maintained the following policy in its handbook:

> (1) **EMPLOYMENT RECORDS**
>
> Purple maintains a personnel file for each employee. The file includes confidential information such as your job application, resume, documentation of performance appraisals and salary increases, and other employment records. You have a right to inspect certain documents in your personnel file, as provided by law, in the presence of a Human Resources representative at a mutually convenient time. No copies of documents in your file

[51] Nor do I agree with Respondent's contention that its confidential demarcation is shielded from liability because it is somehow ambiguous. In the context of a disciplinary notice, a designation of "CONFIDENTIAL" means one thing: "don't tell anyone about this discipline."

> may be made, with the exception of documents that you have previously signed. You may add your comments to any disputed item in the file.

Respondent's employee handbook, at least in the context of employee's use of electronic communications, specifically warns that:

> All employees are expected and required to protect the Company's trade secrets and other confidential information. Company trade secrets or confidential information should never be transmitted or forwarded to outside individuals or companies not authorized to receive the information.

(Jt. Exh. 24 at 9, 30–31; GC Exh. 2 at 9, 31)

b. Analysis

The Board has long held that a prohibition on employees' disclosure of personnel information, including their salary information, violates the Act. Such was the case under the now-defunct first prong of *Lutheran Heritage*, discussed supra, see *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), enfd. 746 F.3d 205 (5th Cir. 2014), as well as cases decided prior to *Lutheran Heritage*. See, e.g., *Heck's, Inc.*, 293 NLRB 1111, 1119 (1997) (handbook "request" that employees not discuss wages unlawful where employer "failed to establish any business justification for this restraint") (citing *Scientific-Atlanta, Inc*., 278 NLRB 622, 625 (1986); *Waco, Inc*., 273 NLRB 746 (1984)).

In applying the Board's new, *Boeing* "balancing test" to the rule at hand, my first task is to evaluate its potential impact on employees' Section 7 rights. On its face, the rule does not explicitly bar employees from discussing their salary information with each other, or with third parties. It does, however, characterize salary increases "and other employment records" as "confidential." The question is whether, read in conjunction with the handbook's stated expectation that employees not share confidential information with "outside individuals," the rule would be reasonably construed as a prohibition on sharing salary information or "other employment records" for Section 7 purposes (i.e., disclosing such information to a Board agent or Department of Labor investigator). I find that it would.

Wages are "probably the most critical element in employment." *Scientific-Atlanta, Inc.*, 278 NLRB at 625 (unlawful to bar employee discussions regarding pay increases); see also *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218, 220 (1995) (employee discussions regarding wages, the core of Section 7 rights, are "the grist on which concerted activity feeds") (citing *Jeannette Corporation v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976), enfd. in part 81 F.3d 209 (D.C. Cir. 1996). As such, Respondent's effort to prevent employees from discussing their salary is a clear and direct attack on a core right guaranteed by the Act.[52]

[52] To the extent that Respondent argues that its policy merely seeks to protect its *documentation of* salary increases, I doubt this interpretation would leap to the mind of a reasonable employee-reader; indeed, absent evidence that Respondent seeks to protect some nonsubstantive aspect of a documentary record of a salary increase (a confidential font, perhaps?), this explanation simply does not hold water.

Nonetheless, I must balance this incursion with Respondent's proffered business justification. I find the latter vastly outweighed by the former. While Respondent professes an interest in protecting its employees' "highly sensitive and private information," it is a given in modern-day workplaces that, whether by custom or legal obligation, employers protect such information from third parties, this cannot justify a wholesale ban on employees' discussing their own wages. See *Waco, Inc.*, 273 NLRB 746, 748 (1984) (absent a legitimate and substantial business justification, rule prohibiting employees from discussing their wages is unlawful); see also *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1219–1220 (1976) (handbook rule stating "[s]alary information is confidential and should not be discussed" unlawful on its face) (citing *Jeannette Corporation v. NLRB*, supra)).

In a related allegation, the General Counsel alleges that Respondent additionally violated the Act by requiring that employees sign an acknowledgement form stating that they agree with and understand the handbook containing this rule. At hearing, the parties stipulated that this was the case. (Jt. Exh. 99, 100) Contrary to the General Counsel's allegation, I can find no Board authority for the proposition that an employer violates the Act by requiring its employees to acknowledge and agree to the provisions of an employee handbook later found to contain an unlawful rule. Work rules are one-sided demands of employee conduct that carry an implicit (and oftentimes explicit) threat of discipline for noncompliance; by promulgating an unlawful rule, an employer creates a standing chill on its employees' Section 7 rights. I do not believe, however, that a reasonable employee would perceive a heightened chill as a result of being required to sign a standard acknowledgement form for a handbook containing such a single, unlawful rule, along with dozens of other, lawful rules. I therefore recommend that this allegation, set forth at ¶ 5(f) of the complaint be dismissed.

L. *Weingarten* and related violations

It is well settled that Section 7 guarantees an employee the right to be accompanied and assisted by a union representative at an "investigatory" interview, that is, one which an employee would reasonably believe may result in disciplinary action. *NLRB v. Weingarten*, 420 U.S. 251, 260 (1975). Recognizing this employee right to representation—now commonly referred to as the "*Weingarten* right"—effectuates the Act's stated purpose of eliminating the "inequality of bargaining power between employees . . . and employers." Id. at 262. As the Supreme Court has explained:

> [a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.

Id. at 262–263.

The Court cautioned, however, that *Weingarten* rights are not intended to displace "legitimate employer prerogatives" in effectuating workplace discipline, which may include proceeding to discipline absent any interview.[53] Less clear, under *Weingarten*, is the extent to which an employer, having granted an employee's request for a representative, may legitimately set boundaries and limitations on that representative's role during the investigatory interview. In this regard, the Supreme Court directs that a balance be struck between employer and employee interests; this directive has been applied by the Board, with court approval, to mean that an employer may insist on hearing the employee's own account of the matter under investigation, but that the employee's representative must nonetheless be permitted to take an active role in assisting the employee to present the facts. *NLRB v. Texaco, Inc*., 659 F.2d 124, 125–127 (9th Cir. 1981); *United States Postal Service*, 288 NLRB 864, 867 (1988) (the "[p]ermissible extent of participation of representatives in interviews . . . lie[s] somewhere between mandatory silence and adversarial confrontation").

In this case, the General Counsel alleges that, on several occasions, Haraz and Veith denied unit employees the effective representation of their designated *Weingarten* representatives by unlawfully limiting their participation in investigatory interviews, and additionally promulgated unlawful restrictions on the role of *Weingarten* representatives in future interviews. By way of background, the parties' CBA provides that, in the event of an investigatory interview, "[t]he manager conducting such an interview must notify the employee in advance of the nature of the meeting." (Jt. Exh. 1)

1. Veith conduct

Veith is alleged to have violated the *Weingarten* rights of three employees and additionally to have promulgated several overly broad and discriminatory rules regarding Union representatives' conduct during investigatory meetings.

a. Espinoza interrogation on June 17 [¶ 5(q)]

The General Counsel alleges that, on June 17, Respondent, by Veith, denied the request by employee Karly Espinoza (Espinoza) for *Weingarten* representation. Respondent claims that the meeting in question was not investigatory in nature.

(i) Facts

Espinoza, who currently works as a VI for Purple in Denver, was summoned by her direct supervisor, Veith, to attend a meeting in her office. Once she had entered the office, Espinoza told Veith, "one moment. Let me grab [steward Proper]."[54] Veith responded that they were just going to have "a discussion" and that the presence of a steward was not "appropriate." Veith then presented Espinoza with customer complaints and asked if she had anything to say about

[53] Under the *Weingarten* framework, an employer may not be compelled to proceed with an investigatory meeting once a representative has been requested. Instead, the employer may deny the request, forcing the employee facing discipline to choose between proceeding with the interview unaccompanied or foregoing it altogether, along with its potential benefits. 420 U.S. at 258 (citing *Mobil Oil Corp.*, 196 NLRB 1052, 1052 (1972)).

[54] According to Espinoza, Proper was in fact available at the time. (Tr. 2083–2084)

them. Espinoza, who had previously received a verbal "coaching" about prior customer complaints, read the new complaints, stated "this seems like an investigatory meeting and I have a right to have a steward." She again asked if she could go and get Proper. Again Veith responded, "we're just having a discussion. This isn't investigatory."

The two women proceeded to discuss the customer complaints, with Espinoza attempting to explain her conduct with respect to each individual complaint. At the end of the meeting, Veith told Espinoza that she felt her personal life was negatively affecting her performance and suggested that she step down to part-time employment or reduce her hours.[55] On June 24, Espinoza received a discipline based on the customer complaints discussed during the June 17 meeting. (Tr. 1301, 2076–2081; Jt. Exh. 45, 56)

(ii) Analysis

As noted, Respondent claims that this meeting amounted to no more than an informal "coaching" session which did not trigger any right to a representative. I disagree. Espinoza was asked to defend her work performance in the face of customer complaints lodged against her; certainly a reasonable employee in her position (having already received a "coaching" about her interactions with customers) would have cause to believe that her answers could impact whether the new complaints would lead to further discipline. As such, Espinoza was entitled to request a *Weingarten* representative. She twice did so, only to be informed by Veith each time that the meeting was not investigatory.

Significantly, Veith did not in fact *deny* Espinoza's request, which she validly could have done (thereby forcing Espinoza to choose whether to proceed alone in the face of potential discipline). Instead, Veith affirmatively misled Espinoza into believing that the meeting could not lead to discipline, thereby coercing her into participating in an investigatory meeting without representation.[56] Such conduct violates the Act. See *Las Palmas Med. Ctr.*, 358 NLRB 460, 469 (2012) ("because the employer first determines whether to permit union representation, it must bear the risk for falsely characterizing the nature of the interview…[a]ny contrary finding would violate public policy by allowing a supervisor's deception to defeat a union employee's *Weingarten* rights").

Accordingly, I find that Respondent, by Veith, violated that Act by interrogating Espinoza on June 17, as alleged in ¶ 5(q) of the complaint.

[55] I base my factual findings regarding this meeting on Espinoza's testimony. I found her plainspoken and not prone to exaggeration; in addition, I note she recited a very detailed discussion of the individual complaints she discussed with Veith during the meeting. Veith, by contrast, testified that she didn't recall "anything about that meeting." (Tr. 1300–1301, 2078–2079)

[56] Contrary to Respondent's assertion, I find that Espinoza, acting in good faith on Veith's misrepresentation, did not waive her *Weingarten* rights. See *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977) ("[b]efore inferring that a waiver has occurred...the Board must assure itself that the employee acted knowingly and voluntarily").

b. Espinoza interrogation on January 4, 2017 [¶ 5(bb)]

The General Counsel alleges that, on January 4, Veith again denied Espinoza's request for *Weingarten* representation.

(i) Facts

On January 4, 2017, Espinoza met with Veith and Leo. At the meeting's outset, Veith stated that Leo was only present for the purpose of taking notes. Espinoza responded by asking if she could have a notetaker, but Veith said no. Espinoza then asked if she could record the meeting, to which Veith again said no. Espinoza next requested to have either a union representative or another employee present. Veith responded that she was not entitled to representation, because it was a "disciplinary meeting." Veith then presented Espinoza with a disciplinary notice. (Tr. 1339, 1341, 2087–2097)[57]

(ii) Analysis

I agree with Respondent that Espinoza was not entitled to a *Weingarten* representative for this discussion. It is well established that, for *Weingarten* rights to attach to an interview, discipline must 'hang in the balance'; if the employee's disciplinary outcome is not dependent on the interview in question, there is no right to a representative. *Baton Rouge Water Works, Co.,* 246 NLRB 995, 997 (1979) (no right to representative at meeting "held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision"). Because the record establishes that Veith met with Espinoza for the sole purpose of presenting her with previously drafted disciplinary notice and asked her no questions, the interview was not "investigatory" and no right to representation attached.

I therefore recommend dismissal of ¶ 5(bb) of the complaint.

c. Mayer interrogation on October 10 [¶ 5(u)]

The General Counsel alleges that, on October 10, Veith effectively denied the request by employee Jody Mayer (Mayer) for *Weingarten* representation by ordering her representative, VI-steward Proper, to remain silent during an investigatory interview.

(i) Facts

In October 2016, current employee Mayer worked as a VI in Denver, when she was ordered to attend a meeting with Veith. Veith informed Mayer that the purpose of the meeting was to discuss her "customer contact/conversation percentage," a term with which Mayer was

[57] I do not credit Espinoza's testimony that, during this meeting, she was asked to defend herself or that she and Veith discussed the complaints underlying the discipline. Her recollection of the details of this meeting was far less impressive than that of the June 17 meeting; rather than recalling the specifics of this meeting, she simply offered, "I feel like any time on called in that office I'm defending myself or something." (Tr. 2097–2098)

unfamiliar. Veith additionally informed her that she was entitled to union representation at the meeting. (Tr. 1156, 1382, 1388; GC Exh. 50)

The meeting took place on October 10, with VI-steward Proper in attendance as Mayer's representative. Veith opened the meeting by stating that they were going to discuss Mayer's failure to meet a minimum "utilization" requirement.[58] At this point, Proper attempted to question Mayer about an extenuating circumstance that may have caused her under-performance, but Veith interrupted and said that the circumstance did not apply. Veith then asked Mayer to explain why her "session efficiency" was low during two specific work shifts; Proper interjected in an attempt to make sure that Mayer understood the meaning of that term before she answered. Veith told Proper to stop interrupting, at which point Proper "kind of shut down" while Mayer attempted to explain her performance. As the meeting wrapped up, Veith and Proper disputed what time it was, for purposes of Proper accounting for her union time; as Proper explained, she tried unsuccessfully to convince Veith that she should get credit for time spent returning to her work station. At the meeting's end, Veith told Proper, "this meeting's over, honey." (Tr. 1156–1159, 1161, 1165, 1310–1311, 1357; Jt. Exh. 51)

I have based my findings regarding this meeting on the testimony of Proper as partially corroborated by both Veith and Mayer, although I note that Mayer's testimony was less reliable in that she claimed to recall only "the tone of the meeting," as opposed to the specifics.[59] Veith, for her part, admitted to telling Proper that she wanted to speak with Mayer "without interruption." (Tr. 1324)[60]

(ii) Analysis

The General Counsel argues that, by telling Proper to "stop interrupting," Veith effectively denied Mayer the assistance and counsel of her chosen *Weingarten* representative.[61] I agree.

Serving as an employee's *Weingarten* representative is a form of protected union activity. *Murtis Taylor Human Services Systems*, 360 NLRB No. 66, slip op. at 2 (2014); *Corrections Corp. of America*, 347 NLRB 632, 636 (2006). While as noted, supra, this representational right must be balanced against the employer's legitimate need to investigate employee misconduct, a *Weingarten* representative may not be made to act as a passive observer, even temporarily, during the interview. *Texaco, Inc.*, 251 NLRB 633, 643 (1980), enfd. 659 F.2d 124 (9th Cir. 1981); *Lockheed Martin Astronautics*, 330 NLRB 422, 430 (2000). In keeping with an employee's right to active *Weingarten* representation, a representative's conduct remains protected even when he interrupts the employer's questioning to ask clarifying questions, *Postal*

[58] Utilization refers to the amount of time a VI is connected to both parties on a call; it is required that individual interpreters rate within 3 percent of their peers for utilization at 3 different times of day. (Tr. 1157–1158)

[59] I do not find that Mayer was deliberately evasive in her testimony, but rather that her recollection was impaired by her highly agitated state during the meeting. (Tr. 1392–1395)

[60] I do not credit Veith's attempt to "clean up" this admission by adding that she also told Proper to "please" hold her questions until "the end" or, alternately, when she was done speaking; nor do I suggest that such statements would themselves have been lawful.

[61] It is clear—and Respondent does not dispute—that the investigatory nature of this meeting entitled Mayer to representation.

Service, 288 NLRB 864, 868 (1988), or advises the employee to refrain from answering certain questions until clarification is given. *Murtis Taylor Human Services Systems*, supra.

Here, Proper acted wholly within the proper scope of her representational capacity during the meeting. Rather than attempting to impede Veith's questioning, her efforts enhanced it by raising potential extenuating factors for Mayer's alleged underperformance. She also interjected after a question to ensure that Mayer was not confused by Veith's reference to "session efficiency." This is the very type of protected conduct the Board has found an employer must abide in an investigatory meeting. *USPS (NALC, Branch 753)*, 351 NLRB 1226, 1227 (2007) ("neither an employer's right to conduct the interview, nor any other legitimate prerogative, extends to entrapping an employee into unknowingly confessing to misconduct without objection from his representative").

Accordingly, I find that, by barring Proper from making any interruptions during her questioning, Veith denied Mayer the effective assistance of her representative in violation of the Act as alleged in ¶ 5(u) of the complaint.

d. Veith's emailed rules regarding union conduct in investigatory meetings [¶ 5(x)]

Four days following Mayer's investigatory meeting, according to the General Counsel, Veith unilaterally promulgated a set of overly broad and discriminatory rules governing Proper's conduct in future investigatory meetings, in violation of sections 8(a)(5) and (1) of the Act.

(i) Facts

On October 12, Proper sent Veith an email complaining about being called "honey" at the end of Mayer's investigatory meeting. Two days later, Veith apologized via email. She went on to state the following regarding Proper's role in investigatory meetings:

> I have been bothered by our interactions in several investigatory meetings and I appreciate the opportunity to clarify roles and expectations. I experience your approach in our investigatory meetings to be extremely disrespectful, combative, and in general taking liberties that are not appropriate to your role as Union Steward. Moving forward, I would also like to be treated in a respectful manner and to be assured that you will work within the limitations of your assigned rule.

She then listed her "expectations" for future investigatory meetings, which included the following:

- I expect to meet with a Purple employee without interruption.
- I expect to hold the floor when I am conducting a meeting with a Purple employee.

> • The steward must be allowed to have a private meeting with the employee before questioning begins. Please note, these meetings must take place off the VRS floor. I have seen several meetings happen on the VRS floor and moving forward, please use the quiet room, conference room, or other quiet space off the VRS floor for these meetings.
>
> • Union meetings with employees may occur only BEFORE questioning begins.
>
> • The steward can speak during the interview, but cannot insist that the interview be ended.
>
> • When the questioning ends, the steward can provide information to justify the employee's conduct.
>
> • I support you to choose an approach that is non-combative. Standing and attempting to use intimidating body language is unprofessional and disrespectful. Sarcastic and snide comments, overt or under your breath, is unprofessional and disrespectful.
>
> • And finally, I expect you to remember the investigatory meeting is between management and the Purple employee. This meeting is an inappropriate place to debate policy regarding Union Steward considerations like a timesheet.[62]

After listing some further guidelines regarding how Proper was to account for her time spent in during investigatory meetings, discussed infra, Veith concluded her missive as follows:

> In closing, I have observed and tolerated several disrespectful choices from you since becoming Center Manager. I gave you the benefit of the doubt when I should have set boundaries from the beginning. I regret giving you the false impression that you had any authority beyond the rights afforded to you as an employee and as a steward. I look forward to moving forward in a mutually respectful manner with clearly defined roles and expectations.

(Jt. Exh. 53) It is undisputed that none of Veith's stated expectations or guidelines was the result of bargaining with the Union. (Tr. 970–972, 1332–1333)

[62] As discussed, infra, the subject of how Proper was to account for her time spent in the meeting was discussed near its end.

(ii) Analysis

The General Counsel alleges that, by her October 14 email, Veith unilaterally promulgated numerous unlawful and discriminatory rules. I agree with respect to certain aspects of the email, and disagree as to others.[63]

First, to the extent it barred Proper from interrupting during investigatory meetings, required that Veith "hold the floor" and allowed Proper to provide exculpatory information only after Veith's questioning ended, the email set forth rules expressly aimed at and promulgated in response to Proper's exercise of Section 7 rights during the October 10 meeting. As the Board has held, forcing a *Weingarten* representative to act as a passive observer, even temporarily, violate the Act. *Texaco, Inc.*, 251 NLRB at 643; *Lockheed Martin*, 330 NLRB at 430. Accordingly, I find that these rules—which have a direct and significant impact on Section 7 rights in the critical *Weingarten* representation context—cannot be justified by Respondent's prerogative to investigate employee misconduct and therefore violate Section 8(a)(1). In addition, Veith's insistence that, going forward, any consultation between an employee and her *Weingarten* representative take place "off the VRS floor," amounts to an unlawful ban on Section 7 discussions in the workplace. There is no evidence that Respondent has ever banned any other form of communication between employees on its production floor, and Respondent has offered no justification for singling out discussions between a steward and an employee preparing for an investigatory interview in this regard. As such, this rule violates the Act. See, e.g., *Station Casino, LLC*, 358 NLRB 1556, 1634 (2012) (rule prohibiting "union talk" unlawful).

Finally, I find that Veith's suggestion that she would consider Proper's standing during an investigatory meeting, using intimidating body language, or making sarcastic or "snide" comments violates the Act. While the Board has indicated that it considers general civility rules lawful, Veith's effort to editorialize Proper's representational conduct is not a general rule; it was promulgated in response to Proper's Section 7 conduct and expressly applies a *heightened* civility standard to stewards attempting to represent their coworkers. A prior restraint based on such a vague and subjective standard (what, precisely constitutes a "snide" comment?) constitutes a direct and substantial incursion on the Section 7 rights of both stewards and the employees they represent. Nor has Respondent shown Veith's pronounced standards to be justified by business necessity; while Respondent is certainly entitled to interview its employees about their potential misconduct, Respondent has not demonstrated that holding *Weingarten* representatives to a heightened etiquette standard is necessary to achieve that goal.

Accordingly, I find that, by her emailed statements set forth at ¶ 5(x)(2), (3), (5), (6) and (7) of the complaint, as well as the portion of her email stating that "meetings must take place off the

[63] I do not agree with Respondent that the Board's decision in *Food Services of America, Inc.*, 360 NLRB 1012, 1016, fn. 11 (2014) dictates that Veith's pronouncements did not amount to the promulgation of rules of general applicability. That case, however, dealt with a supervisor verbally advising an employee that "[he] could really have a future with the company if [he] stopped talking to [a former employee]." Veith's email, by contrast, clearly imparted expectations for stewards' *Weingarten* representation, which would necessarily impact other employees. Indeed, while addressed to Proper, the rules themselves were framed as rules for all stewards participating in such meetings, and repeatedly referred to the conduct of "the steward," and not Proper alone.

VRS floor" as set forth at ¶ 5(x)(4) of the complaint, Veith violated Section 8(a)(1) of the Act. Because her statements took direct aim at protected Section 7 conduct and had a direct impact on the terms and conditions of unit employees seeking to exercise their *Weingarten* rights, I find that they also violated Section 8(a)(3) of the Act. Finally, as there is no evidence that Respondent had ever held union stewards to such standards in the past, Veith's directives—presented as a *fait accompli*—constituted unlawful unilateral changes. *USPS (NALC Branch 283)*, 341 NLRB 684, 687 (2004) (unilateral change to manner in which union representatives may carry out representational duties violates Section 8(a)(5)).

The remaining portions of Veith's email, I find, do not amount to violations of Section 8(a)(5), (3) or (1). First, her suggestion that investigatory meetings not be used as a venue for the steward to "debate policy" (such as how whether the steward should be afforded official time for the meeting) is in keeping with the *Weingarten* policy of preserving the employer's right to investigate in an environment free from collective bargaining. See *Weingarten*, supra at 258–259. Likewise, her statement that a steward has no right to insist that an investigatory interview be ended is consistent with the Board's concern that *Weingarten* rights not intrude on an employer's legitimate prerogative to investigate misconduct. Nor do I find unlawful her statement that stewards "must be allowed to have a private meeting with the [represented] employee before questioning begins"; this is simply an accurate statement of the law. See *Climax Molybdenum Company, a Division of Amax Co., Inc.,* 227 NLRB 1189 (1977), enforcement denied 584 F.2d 360 (10th Cir. 1978). Finally, Veith's comments about Proper's "role" and "authority" and their respective "roles and expectations," while perhaps curt (or even snide), simply do not themselves set forth constitute independent, substantive rules governing, or adverse actions regarding, Proper's conduct going forward.

Accordingly, I recommend that the allegations set forth at ¶ 5(x)(1), (5), (8), (9), (10) and the portion of Veith's email stating that "[t]he steward must be allowed to have a private meeting with the employee before questioning begins" as set forth at ¶ 5(x)(4) of the complaint be dismissed.

e. Veith's rule on Proper's use of contractual union time [¶ 6(f)]

The General Counsel also alleges that, by her email, Veith imposed a unilateral and discriminatory rule providing that time a steward's time spent using the restroom while serving as a Union representative during investigatory interviews would not be considered contractual Union time and could reflect negatively in her VI performance ratings. This "bathroom time" rule is alleged as a violation of section 8(a)(5) and (3) of the Act.

(i) Facts

The CBA contains the following language regarding the treatment of stewards' time spent acting as a representative in an investigatory interview:

> Article 25 – Employee Representatives
>
> 1. Time spent by Union stewards in grievance meetings or when representing an employee in investigatory meetings during the steward's workday shall be considered working time.
>
> 2. An employee's participation as Union representative in meetings of thirty (30) minutes or longer shall not reflect negatively in any performance standard.

(Jt. Exh. 1) The performance standard most relevant to article 25 is "log in percentage": VIs are expected to be "logged in," i.e., capable of taking calls, at least 80 percent of their work time. Failure to meet this percentage can lead to discipline. (Tr. 1166, 1334–1336)

Veith's email contained the following statement regarding the dispute about "union time" she and Proper had engaged in at the close of Mayer's *Weingarten* meeting:

> I, also, want to clarify—"agreeing" to meeting times means you and I see the same time on the clock at the end of the meeting. After the meeting, you might want to debrief with the employee, that is not part of Union time. Union meetings with employees may only occur BEFORE questioning begins. *You might need a bathroom break which is also not Union time.* The meeting ends when we have concluded the investigatory meeting and not when you return to your work station.

(GC Exh. 53) (emphasis added). Proper testified that she had previously understood herself to be entitled to "union time" for the entirety of an investigatory meeting, including bathroom breaks, but provided no concrete examples of when this had actually occurred. (Tr. 1164–1165) Respondent likewise provided no evidence regarding the parties' past treatment of bathroom breaks for purposes of the 30-minute calculation.

(ii) Analysis

As noted, where an employer unilaterally alters the manner in which a union representative may carry out his representational responsibilities, Section 8(a)(5) is violated. *USPS (NALC Branch 283)*, supra. Here, however, I find no credible record evidence that time spent by a steward in the bathroom was, in fact, ever considered time spent "in meetings" for purposes of the contract's 30-minute union-time rule. In the absence of such evidence, I have no basis on which to conclude that a unilateral change was made. As such, I shall recommend the Section 8(a)(5) allegation be dismissed.

Turning to the 8(a)(3) allegation, I do not find that Veith's requirement that time spent during bathroom breaks be subtracted from Proper's union time constituted discrimination based on her union activity. Indeed, I find Veith's "bathroom break" rule wholly consistent with the parties' contract, which makes it clear that Respondent will apply its performance metrics to a steward without consideration of any time she spent *in a meeting* acting as an employee's representative, unless that time exceeds 30 minutes. There being no evidence that Respondent in fact conducts investigatory meetings in bathrooms, Veith's reminder that bathroom time does not count towards meeting time appears to me a reasonable and appropriate interpretation of the terms on which the parties agreed. I shall therefore recommend that the 8(a)(3) allegation be dismissed.

2. Haraz conduct

Haraz is alleged to have violated the *Weingarten* rights of three employees and additionally to have promulgated an overly broad and discriminatory rule regarding union representatives' conduct during investigatory meetings.

a. Downey interrogation on September 29 [¶ 5(s)]

(i) Facts

On September 29, Tempe VI Brett Downey (Downey) was summoned to the center manager's office to meet with Haraz and Stambaugh via video conference. Downey was not informed of the purpose of the meeting, but in attendance was VI-steward Caplette.[64] Haraz opened the meeting by telling Downey that she was investigating an issue involving his conduct and that he was entitled to have a representative present. She then asked him if he wanted Caplette to remain, to which he said yes. (Tr. 314, 450, 588–589, 847, 850)

Haraz next said that Downey had been accused of showing an "inappropriate" magazine to his coworkers. She began asking him about the incident, as well as about what type of reading material he kept at work. During this questioning, according to Downey, Caplette interjected, asking Downey to elaborate on his answer. In response, Haraz became aggressive in tone, telling Caplette, "we need to stop here . . . and clarify your role, Michelle." She then said Caplette was to "just sit there and take notes, and to counsel Downey, but not to speak." Caplette responded that she knew what her job was. During the remainder of the meeting, she continued to interject questions aimed at allowing Downey to explain himself. Haraz ended the meeting by stating that her investigation was ongoing. It is undisputed that, as a result of this interview, Downey was issued a discipline. (Tr. 109, 316–317, 323, 590–591, 602–603, 850–852, 866–867; Jt. Exh. 19)[65]

[64] Caplette had been invited to attend the previous day by Fragassi, who stated that the meeting was going to concern a "conduct issue."

[65] I credit the employees' version of this meeting. Haraz repeatedly stated in her 611(c) testimony that she could not recall the specifics of what she said to Caplette but then, when questioned by Respondent's counsel, suddenly recalled that she said, in an "extremely professional" manner, "Michelle, if you can please allow [Downey] to answer that question himself. I really want to hear it from him." I found this testimony, which went uncorroborated by Stambaugh, scripted and therefore unreliable. (Tr. 115, 174)

(ii) Analysis

It is undisputed that Haraz' questioning of Downey was investigatory in nature; Respondent, however, argues that Caplette's conduct nonetheless justified Haraz telling her that her proper role was to remain silent and take notes. I disagree.

The Board has made clear that the Act is violated where an employer-representative, at the outset of an investigatory meeting, instructs the designated *Weingarten* representative to remain silent throughout the interview. *Texaco, Inc.*, 251 NLRB at 633. Short of such a broad, "prior restraint," employer attempts to curtail a representative's statutorily protected role should be evaluated with an eye towards the employer's right to investigate employee conduct. *Southwestern Bell Telephone Co.*, 251 NLRB 612, 613 (1980). In keeping with this balancing framework, a representative whose actions transform the meeting from a fact finding to an "adversarial confrontation" will be found to have lost Section 7 protection and may be lawfully silenced (or even disciplined) for her conduct. The Board has found this to be the case where a steward engages in disruptive conduct, such as making repeated obstructive, abusive or insulting interruptions during an employer's questioning, that interferes with the employer's legitimate need to investigate. See *Yellow Freight Systems*, 317 NLRB 115, 124 (1995) (steward repeatedly made "verbally abusive and arrogantly insulting interruptions," shouted obscenities, pounded the desk and called supervisor a liar); *New Jersey Bell Telephone Co.*, 308 NLRB 277, 280 (1992) (steward impermissibly interfered with employer's investigation by repeatedly objecting to employer's questions and insisting that employee refuse to respond to questions asked more than once).

Such is not the case here. While Caplette admittedly "chimed in" throughout the meeting, there is no evidence that her conduct was violent, verbally abusive, arrogant or insulting, or that she attempted to limit the scope of Haraz' questions in any way. Instead, she fulfilled her representative role by encouraging Downey to offer an explanation for his conduct. A *Weingarten* representative is not relegated to the status of a silent observer, but is entitled to give "active assistance" to the represented employee. *Washoe Medical Center*, 348 NLRB 361, 361 (2006) (quoting *Barnard College*, 340 NLRB 934, 935 (2003)). That is what Caplette did, without unduly interfering with Haraz' questioning or otherwise transforming the interview into an adversarial confrontation. Accordingly, I find that Caplette was engaged within the proper scope of her representational capacity during the meeting and that, by barring her from making any interruptions during her questioning, Haraz denied Downey the effective assistance of his representative in violation of the Act as alleged in ¶ 5(s) of the complaint.[66]

[66] Respondent argues that no violation should lie, however, because, after Haraz attempted to silence her, Caplette continued to participate. This misses the point; ordering a union steward to cease participating during a disciplinary meeting works to intimidate the employee being interviewed by—at a minimum—suggesting that the steward may herself face discipline for her efforts.

b. Maschue interrogation on September 29 [¶ 5(t)]

The General Counsel alleges that, on September 29, Haraz effectively denied the request by employee Nora Maschue (Maschue) for *Weingarten* representation by taking actions during an investigatory interview, including interrogating Maschue about her union activities[67] and demanding that she "swear" she had not been coached to lie,[68] that prevented her union representative from effectively providing her with assistance and counsel during the interview.

(i) Facts

Tempe VI Maschue was ordered to meet (via video) with Haraz and Stambaugh immediately following Downey's meeting. Despite the fact that the collective-bargaining agreement obligated Respondent to provide Maschue advance notice of the purpose of the meeting, she was given no such notice. When Maschue arrived for the meeting, Caplette was present (having been asked to stay following Downey's meeting). At the onset of the meeting, Haraz informed Maschue that she was entitled to union representation and asked her to confirm that she wanted Caplette to stay. At the same time, Caplette passed Maschue a note saying that they could confer with each other if Maschue wanted to. In response, Maschue told Haraz that she wanted to "counsel" with Caplette. An admittedly displeased Haraz[69] appeared reluctant, but agreed to let them leave the room. (Tr. 121, 175, 451, 605–606, 852–853)

The two returned a couple of minutes later, at which point Haraz asked Maschue whether her meeting with Caplette would "inhibit [her] ability to answer questions honestly." Maschue responded that she would be able to answer questions "just fine." Haraz, however, continued to insist that either Maschue or Caplette would need to "attest" that their consultation was not going to influence Maschue's responses to her questions. Maschue testified that this exchange continued for a couple of minutes until she had twice repeated that she would be able to answer all of Haraz' questions truthfully and that her conversation with Caplette would not inhibit her ability to do so. The meeting then proceeded, and Haraz asked Maschue questions about the Downey magazine incident; as Stambaugh testified, these questions were intended to determine whether Maschue herself had engaged in misconduct. At the meeting's conclusion, Haraz said there would be an ongoing investigation and Maschue would be informed of the results. (Tr. 335–336, 605–608, 611–612, 853–857)

[67] This conduct is also alleged as an unlawful interrogation in violation of Section 8(a)(1).

[68] This conduct is also alleged as a threat of unspecified reprisals in violation of Section 8(a)(1), an adverse action in violation of Section 8(a)(3), and unilateral change in violation of Section 8(a)(5). (See ¶ 6(d))

[69] Haraz testified that she considered the caucus to be an "obstruction" to her investigation.

I have based my factual findings regarding this meeting on Maschue's testimony, as generally corroborated by Caplette,[70] and, to a lesser extent, Stambaugh.[71] Once again, Haraz claimed to be unable to recall specific details about the meeting, but rather seemed intent on recasting selective aspects of it in a light more favorable to Respondent's case.[72]

(ii) Analysis

As a preliminary matter, I find that the nature and circumstances of Maschue's questioning, as well as Haraz' statement earlier that she was entitled to representation, would reasonably cause an employee in Maschue's position to believer that her discipline hung in the balance during this interview, and thus, her *Weingarten* rights attached.

Interrogation: The General Counsel alleges that, by asking Maschue whether her caucus with Caplette would inhibit her ability to answer questions honestly, Haraz unlawfully interrogated her about her union activities, as well as those of Caplette. I agree.

Clearly, the act of caucusing before a *Weingarten* interview constitutes protected conduct. See *Murtis Taylor Human Services Systems*, 360 NLRB No. 66, slip op. at 2; *Corrections Corp. of America*, 347 NLRB at 636. Nonetheless, this does not mean that Haraz had no right to ask Maschue anything about the conversation in question; in fact, she was entitled to ask about unprotected conduct that took place during their otherwise protected caucus. Thus, were the Board to find the act of coaching an employee to lie during an investigation unprotected,[73] Haraz would have been permitted to inquire whether Caplette had coached Maschue to tell a falsehood during interview that followed. See, e.g., *HCA/Portsmouth Regional Hosp.*, 316 NLRB 919, 919 (1995) (lawful for employer to ask about defamatory statements made in furtherance of protected conduct).

However, Haraz did not limit her inquiry to whether Caplette had directed Maschue to lie during the interview; her question was broader, asking Maschue whether there was any reason why, as a result of the caucus, she would be inhibited in her ability to answer questions honestly.

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[70] I do not credit Caplette's testimony that Haraz also asked explicitly asked Maschue whether Caplette had directed her in how to answer questions, suggested answers to her or directed her not to answer questions. I found this testimony (uncorroborated by Maschue herself) was presented in a somewhat histrionic fashion, suggesting that it was embellished.

[71] Stambaugh grudgingly admitted (consistent with her notes of the meeting) that, after Maschue and Caplette returned from their caucus, one of them represented that their meeting would not "impact the integrity" of Respondent's investigation, an assurance that "may" have been prompted by Haraz' request for the same. (Tr. 326–332; Jt. Exh. 20)

[72] She claimed, for example, to have been concerned about the employees' caucus because it occurred in the "middle" of the meeting, after she had made "progress" with her investigation. This testimony was contradicted by Stambaugh's meeting notes, which indicate that the break took place before the significant bulk of the questioning took place. (Tr. 121; Jt. Exh. 20)

[73] I find no direct authority on this interesting issue, but note that the Board has countenanced a union official's lack of candor in other instances. See, e.g., *Roadmaster Corp.*, 288 NLRB 1195 (1988) (falsifying employees' signatures on grievances is protected concerted activity), 874 F.2d 448 (7th Cir. 1989); but see *Fresenius USA Mfg. Inc.*, 362 NLRB No. 130 (2015) (employee's dishonesty during employer's legitimate investigation of facially valid and serious complaints of misconduct unprotected).

I find that a reasonable employee under the circumstances would understand the Haraz wanted to know whether Caplette had discouraged her from being fully honest, for example, by coaching her to keep her answers brief, feign ignorance or misunderstanding, or refuse to respond to certain questions. Such coaching, depending on the nature discipline Maschue faced, would be legitimate and protected conduct not properly the subject of employer interrogation. As the Board recently held, an employer investigating unprotected conduct must nonetheless "focus closely" on such conduct and "minimize intrusion into Section 7 activity." *Time Warner Cable New York City, LLC*, 366 NLRB No. 116, slip op. at 4–5 (2018) (finding unlawful questioning, during investigation of unlawful strike, where inquiries "intruded into Section 7 communications between employees"). Again, even assuming that Haraz was entitled to inquire as to whether Maschue had been coached to lie, her inquiry went further and effectively calling on Maschue to disclose protected communications that may have occurred during her caucus with Caplette.

Accordingly, I find that, by asking Maschue whether her caucus with Caplette would "inhibit [her] ability to answer questions honestly," Haraz unlawfully interrogated Maschue about her union membership, activities, and sympathies and that of others, as alleged in ¶ 5(t)(3)(i) of the complaint.

Requirement to "swear" or "attest": The General Counsel next alleges that Haraz' insistence that Maschue attest to the truthfulness of her answers constituted an unlawful threat of unspecified reprisals and "taint[ed] the whole interview," effectively denying Maschue the assistance and counsel of her chosen *Weingarten* representative. I disagree. After Maschue exercised her right to consult with her steward, Haraz attempted to regain control of meeting's pace by reminding Maschue that her answers were expected to be truthful. While this posturing may have enhanced the coercive quality of her prior, unlawful interrogation, it did not operate to silence Caplette or curtail her involvement in the meeting that ensued. As such, I do not find that it, in effect, denied Maschue her right to the active representation by Caplette. Nor do I find that a reasonable employee, such as Caplette, would interpret the attestation requirement as signaling a future reprisal against her.

The General Counsel also alleges that Haraz' requirement that Maschue "attest" to the honesty of her answers amounted to a unilateral change in violation of Section 8(a)(5) and a discriminatory adverse action in violation of Section 8(a)(3). While the Board has found similar violations where an employer was found to have required employees to sign written attestations of their statements in a *Weingarten* meeting (see *Murtis Taylor Human Services Systems*, supra) the allegations here fails for a lack of proof. Specifically, the record fails to establish that either (a) Haraz broke with a past practice of *not* requiring employees to "attest" in investigatory meetings; or (b) Respondent has ever failed to require "attestation" from employees who decline representation in such meetings.[74]

[74] According to the General Counsel, "Respondent *likely* does not tell employees to swear or affirm they are telling the truth when a union representative is not present—when Respondent does it after a caucus it further demonstrates discrimination on basis on union activity." (GC Br. at 113) Such speculation falls well short of the General Counsel's prima facie burden under either Section 8(a)(5) or (3).

Based on the above, I therefore recommend that ¶ 5(t)(3)(ii) and (iii) of the complaint be dismissed.

c. Seashols interrogation on October 11 [¶ 5(v)]

(i) Facts

In late August, Tempe VI Kristin Seashols (Seashols) was requested by Stambaugh (via email) to attend a meeting. After a series of unsuccessful attempts by Stambaugh to schedule the meeting with Seashols, Haraz sent her a certified letter on September 21, stating that it was "imperative" that she arrange to attend "a mandatory meeting for [her] performance." When Stambaugh attempted via text message to confirm the date and time for the appointment, Seashols responded that she was waiting to hear about VI-steward Caplette's availability. At this point, Stambaugh texted:

> The meeting is disciplinary in nature and therefore weingarten does not apply. you will not be entitled to a steward for our meeting.

While there appears to have been some confusion about the time period for which Seashols' performance was at issue, Stambaugh's follow-up email on October 11—the day prior to the meeting—made it clear that Seashols' performance was to be the meeting's subject. (Jt. Exh. 15; GC Exhs. 3, 6; Tr. 619–621)

On October 11, Seashols met with Stambaugh in the Center Manager's office with Haraz present on speakerphone. Stambaugh announced that they were going to discuss Seashols' performance during May and June; Seashols informed her that she had already met with Jonagan about this time period and that a faulty video transmission was to blame for her low productivity. Stambaugh then announced that they were going to discuss Seashols' performance during the period from June through August. When Stambaugh asked her to explain why she had failed to meet a particular performance standard, Stambaugh again blamed technical problems, including a defective camera. During the meeting, Stambaugh presented Seashols with a final warning for her alleged underperformance, some of which Seashols, during the meeting, had attributed to Respondent's faulty equipment.[75] After Seashols signed it, the meeting ended and she walked Stambaugh out to the production floor to point out the defective camera they had discussed. (Tr. 628–635, 391, 397)[76]

(ii) Analysis

As a preliminary matter, I reject Respondent's contention that Seashols, by appearing at the October 11 interview without her representative, waived her *Weingarten* rights. As discussed, supra, where a manager lures an employee into an investigatory interview by mischaracterizing it

[75] I credit Stambaugh's testimony that this disciplinary notice was drafted prior to the meeting and that she made no changes to it as a result of the meeting.

[76] I base my factual findings on Seashols' testimony, which was detailed and unvarnished. Neither Haraz nor Stambaugh could recall specific details of the meeting. (See Tr. 349)

as something else, that employee's *Weingarten* rights are undermined and the Act is violated. See *Las Palmas Med. Ctr.*, 358 NLRB at 469. In this case, Stambaugh's email expressly informed Seashols that *Weingarten* rights did not apply to the meeting she was expected to attend. To the extent that her characterization was false, Seashols cannot be held to have waived her rights.

Respondent claims that the meeting was held for the sole purpose of issuing Seashols a discipline, and that therefore *Weingarten* did not apply. I disagree. Where an employer's stated purpose for a meeting is to issue employee discipline, *Weingarten* rights may nonetheless attach if the employer's representative, during the meeting, engages in any conduct beyond merely informing the employee of a previously made disciplinary decision. This may occur where the employer, during the meeting, attempts to gain information to bolster the rationale for the discipline or asks questions unrelated to it. *Becker Group, Inc.*, 329 NLRB 103, 107 (1999); *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979); *Quazite Corp.*, 316 NLRB 1068 (1994). In this case, Stambaugh appears to have done both. First, she used the meeting to ferret out the circumstances on which Seashols blamed for her underperformance, including having her identify the equipment she claimed was faulty. She also appears to have asked questions about her performance during a time period unrelated to the discipline.

Accordingly, I find that, Respondent, by Stambaugh, violated the Act by interrogating Seashols as alleged in ¶ 5(u) of the complaint.

d. October 12 union representative participation rule [¶ 5(w)]

(i) Facts

On October 1, Caplette emailed Haraz, complaining about being improperly restrained in carrying out her steward role during the September 29 meetings. Two weeks later, Haraz countered, accusing Caplette of obstructing *her* right to conduct investigations. Referring to Caplette's conduct in the Downey meeting, she stated:

> Moving forward, if you can please give the employee the opportunity to answer first and if you feel that he or she has not answered fully and in a forthright manner, please ask us to either clarify the question or request that the employee elaborate. You also have the right to elaborate and justify the employee's conduct after the questioning has ended but not during the time the employer is gathering information to figure out if there was in fact any misconduct.

(Jt. Exh. 23)

(ii) Analysis

Haraz' rule conflicts with the Board's recognition of the proper scope of *Weingarten* rights. First, the rule requires Caplette to remain silent during questioning and allows her to ask for clarification of questions only once they have been answered. Thus, the rule expressly prevents

her from inserting a clarifying objection to protect an interviewed employee from unknowingly confessing to misconduct; this the Board would consider an improper limitation "at a crucial juncture of the interview'). *USPS (NALC, Branch 753)*, 351 NLRB at 1227. Additionally, the rule improperly limits Caplette's ability to offer exculpatory evidence (i.e., to "elaborate and justify the employee's conduct") to the time period after Haraz' questioning is complete, which the Board has also found unduly restrictive. See *Lockheed Martin,* 330 NLRB at 429 (after steward was told to "shut up" until the employer's investigator was done questioning, his eventual participation did not "excuse [the] effort to confine his participation during the interview").

Accordingly, by her emailed October 12 union representative participation rule, Haraz promulgated an overly broad and discriminatory rule as alleged in ¶ 5(w) of the complaint.

M. Information request allegations

According to the General Counsel, Respondent on multiple occasions failed and refused to respond to information requests made by the Union, and on other occasions unreasonably delayed in responding to requests. Respondent asserts that it responded to all relevant requests, and made a reasonable, good-faith attempt to do so in a timely manner. Numerous requests, according to Respondent, did not obligate a response, because they sought documents on non-mandatory subjects of bargaining, or subjects with respect to which the Union had waived bargaining by agreeing to the CBA's management-rights clause. Respondent also argues that the Union's information requests were made in bad faith, in an attempt to 'bury' Respondent in paperwork. A discussion of the relevant Board law is followed by an analysis of each information request allegation, below.

1. The applicable standard

An employer is obliged under Section 8(a)(5) and (1) of the Act to supply information requested by a collective-bargaining representative that is necessary and relevant to the latter's performance of its responsibilities to the employees it represents. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). To trigger this obligation, the requested information need not be dispositive of, but only potentially relevant to, the issue in dispute between the parties. *PAE Aviation & Technical Services LLC*, 366 NLRB No. 95, slip op. at 3 (2018); *Piedmont Gardens*, 362 NLRB No. 139, slip op. at 3 (2015); *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991); *Conrock Co.*, 263 NLRB 1293, 1294 (1982). The refusal of an employer to provide relevant information is a per se violation of the Act without regard to the employer's subjective good or bad faith. *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344 (2012); *Procter & Gamble Mfg.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979); *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975).

In analyzing relevance, requested information that relates directly to represented employees' terms and conditions of employment is considered presumptively relevant. *Beverly Health & Rehabilitation Services,* 328 NLRB 885, 888 (1999); *Samaritan Medical Center,* 319 NLRB 392, 397 (1995). With respect to such information, a union is not required to make a specific showing of relevance unless the employer has submitted evidence sufficient to rebut the presumption.

Living and Learning Centers, Inc., 251 NLRB 284, 288 fn. 3 (1980), enfd. 652 F.2d 209 (1st Cir. 1981). Since a bargaining representative's responsibilities include the administration of the collective-bargaining agreement and the processing and evaluating of grievances thereunder, information requests pertinent to a union's decision to file or process grievances are presumptively relevant. *Acme Industrial*, supra at 436; *Beth Abraham Health Services,* 332 NLRB 1234, 1234 (2000); *Safeway Stores*, 236 NLRB 1126 fn.1 (1978).

In the case of non-presumptively relevant information, the General Counsel must establish the relevance of the requested information, by presenting evidence that either (1) the union demonstrated the relevance of the information, or (2) the relevance of the information should have been apparent to the employer under the circumstances. The Board applies a liberal, discovery-type standard in such cases (i.e., as opposed to the standard of relevance in trial proceedings). *Acme Industrial*, supra at 432 fn. 6; *Hamilton Sundstrand*, 352 NLRB 482 (2008). This broad standard is construed "broadly to encompass any matter that bears on or that reasonably could lead to other matter[s] that could bear on, any issue. . . " *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *Hickman v. Taylor*, 329 U.S. 495 (1947). The information need not be dispositive of issues between the parties, but need only have some bearing on them. Thus, an employer must furnish information that is of even probable or potential relevance to the union's duties. *Orthodox Jewish Home for the Aged*, 314 NLRB 1006, 1007–1008 (1994); *Pfizer Inc.*, 268 NLRB 916 (1984); *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

There are, however, limits to the duty to provide information. First, the duty is limited to providing information on a subject with respect to which the employer has a duty to bargain. Therefore, "when the request pertains to a subject that is nonmandatory … then neither employers nor labor organizations are obliged under the Act to furnish information requested for bargaining on [that] subject." *Service Employees Local 535 (North Bay Center)*, 287 NLRB 1223, 1225 (1988) (quoting *American Stores Packing Co.*, 277 NLRB 1656, 1658 (1986)); *Piper Elec., Inc.*, 339 NLRB 1232 (2003) ("there is no duty to furnish information concerning a non-mandatory subject of bargaining"). Such is the case where a union requests information relevant only to a topic with respect to which the requesting union has waived the right to bargain. *American Stores,* supra at 1658 (employer not obligated to provide documents with respect to subject waived by management-rights clause). As noted supra, however, waiver of statutory lights is not to be lightly inferred but instead must meet the Board's "clear and unmistakable" standard. *Metropolitan Edison Co. v. NLRB*, 460 U.S. at 709; *Federal Compress & Warehouse Co. v. NLRB,* 398 F.2d 631, 636 (6th Cir. 1968); *Quality Roofing Supply Co.,* 357 No. 75 (2011); *General Electric Co.*, 296 NLRB 844, 844 (1989). In practice, this means that either the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the union consciously yielded its interest in the matter. *Allison Corp.*, 330 NLRB at 1365; *Trojan Yacht,* 319 NLRB 741, 742 (1995). As to the former, the Board looks to the precise wording of the relevant contract provisions. *Allison Corp.,* supra; *KIRO, Inc.,* 317 NLRB 1325, 1327 (1995).

Second, an employer is not required to respond to information requests made in bad faith. *Jefferson Smurfit Corp.*, 311 NLRB 41, 60 (1993). In this regard, however, vague allegations of a union's bad faith do not suffice as a defense, and when a party is shown to have sought information for a proper and legitimate purpose, it does not lose its entitlement to the information

if there are other reasons for the request. *Ralphs Grocery Co.*, 352 NLRB 128, 135 (2008), adopted following remand by 355 NLRB 1279 (2010); *Associated General Contractors of California*, 242 NLRB 891, 894 (1979), enfd. in part 633 F.2d 766 (9th Cir. 1980); *Country Ford*, supra (citing *Island Creek Coal Co.,* 292 NLRB 480, 489 (1989)). In this case, I find that the Union had a legitimate and proper purpose—carrying out its duties as the unit employees' bargaining representative—for requesting each of the items of information to which I find it is entitled. Therefore, I find no merit to Respondent's "bad faith" argument.[77]

An analysis of the individual information-request allegations follows:

2. Request for dual rate information [¶ 7(n)]

The General Counsel alleges that Respondent failed to provide certain requested information regarding unit employees who were paid at a dual pay rate because they performed both VRS and community interpreting work.

a. Facts

On April 15, Yost, by email, requested that Haraz provide the names of, and actual rate amounts for unit employees paid at a dual rate. Haraz' initial response came the same day; she promised to get back to Yost "shortly." On May 11, Yost followed up, demanding a response by May 13. Again responding the same day, Haraz asked Yost to clarify why the Union needed to know the community rates earned by unit members. "Community interpreting," she noted, "is not covered under the Collective Bargaining Agreement." Yost responded that the dual rates for unit members were "compensation—a mandatory subject of bargaining." (Jt. Exh. 37)

Haraz responded two days later, stating that Yost's request was "out of the jurisdiction of the Union because the Certification of Representation does not cover Community Interpreters." Respondent's position, she concluded, was that the pay rate earned by unit employees when performing community interpreting work is "not subject to collective-bargaining, not covered by the agreement, and [] not included in the Certification of Representation." Id. It is undisputed that Respondent failed to provide information responsive to this request. (Tr. 986)

b. Analysis

It is well settled that information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). Respondent does not dispute this, but instead claims that it was not obligated to provide the requested documents because the Union waived the right to bargain over community interpreting work. For the reasons stated supra at § C, I have rejected this argument.

[77] While Yost was no doubt vigorous in his pursuit of information, I do not believe, based on his demeanor and the record as a whole, that he employed a deliberate strategy to "cripple" Respondent's operations with gratuitous requests. Nor do I agree, as Respondent suggests, that he made many duplicative requests; indeed, each of his requests appears tailored to address a specific, individual action taken by Respondent.

Accordingly, I find that Respondent, by failing to provide the requested information regarding wage rate for "dual rate" employees, violated Section 8(a)(5) as alleged.

3. Request for documentation of caller complaint investigator training [¶ 7(s)]

The General Counsel alleges that Respondent failed to provide certain requested information regarding the training given individuals who are charged with investigating customer complaints lodged against unit employees.

a. Facts

On July 22, Yost emailed a letter to Haraz.[78] As he testified, he had become concerned over what he perceived as an uptick in customer complaint discipline and "sniffed a new policy" was to blame. Referring to "recent and multiple" disciplinary actions over customer complaints, he demanded to bargain over "any new or revised policy that leads to discipline tied to customer complaints." In the same letter, he requested multiple documents relating to customer complaints, including a request for:

> documents, and the dates they went into effect, reflecting any training given to the person or persons who investigate complaints and determine if such complaints warrant disciplinary action.

He received no response. (GC Exh. 59, 59(b); Tr. 2684–2686)

b. Analysis

Respondent urges that the Union waived its right to the subject of the information sought—customer complaint disciplinary standards—by agreeing to the contract's management-rights clause, which reserves to Respondent, inter alia, the right to "demote, suspend, discipline and discharge employees," "maintain the discipline and efficiency of its employees," "establish work standards," "adopt reasonable rules of conduct, appearance and safety, and penalties for violations thereof," and "determine the quality of customer services." (See Jt. Exh. 1) In this case, I agree.

For a management-rights clause to act as a clear, unequivocal, and unmistakable waiver of a union's statutory right to bargain over a particular action taken by the employer, it must be shown that either (a) the clause explicitly references the subject matter at issue; or (b) the bargaining history evidence indicating that the particular matter at issue was fully discussed and consciously explored during negotiations, and that the union consciously yielded or clearly and unmistakably waived its interest in the matter. *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992). Here, there is no contention that the Union acquiesced during bargaining to Respondent's right to develop standards for issuing customer complaint discipline. That said, various portions of the

[78] I give no credence to Respondent's speculation—contrary to Yost's testimony—that this request was never sent.

clause do reserve to Respondent of the right to establish performance standards, enforce discipline and determine the quality of customer service. I find that these provisions, read together, operate to waive the Union's right to bargain over the subject to which the sought documents relate: the standard whereby employees receive customer complaint discipline. See *United Technologies Corp.*, 287 NLRB 198, 198 (1987) (management-rights clause granting employer "right to make and apply rules and regulations for production, discipline, efficiency, and safety" waived union's right to bargain over employer's change in its progressive discipline procedure), enfd. 884 F.2d 1569 (2d Cir. 1989); cf. *Graymont PA, Inc.*, 364 NLRB No. 37 (no waiver of right to bargain over unilateral change to work rules, absenteeism policy, and progressive discipline schedule where management-rights clause did not specifically reference those subjects).

Accordingly, I recommend that the allegation set forth at ¶ 7(s) of the complaint be dismissed.

4. Request for information regarding San Diego facility closure [¶ 7(t)]

The General Counsel alleges that, since about August 3, 2016, Respondent failed to provide certain requested information regarding the temporary closure of Respondent's San Diego call center. Respondent contends that it was not obligated to do so, because the contract's management-rights clause privileged it to close the center temporarily.

a. Facts

By way of background, the CBA contains a no-lockout provision, which states as follows:

> The Company agrees that there shall be no lockout during the term of this Agreement. As used herein, the term "lockout" shall not include the closing down or curtailment of operations or layoffs due to economic conditions, business or operational reasons, natural disaster, or reasons beyond the Company's control.

(Jt. Exh. 1 at 20)

Following a water leak at the San Diego call center during the summer of 2016, Respondent closed the center for 2 weeks. During the closure, the center's calls were routed to other centers and the San Diego VIs were left without work. On July 28, 2016, Yost emailed Haraz, complaining that "employees are feeling uninformed regarding the status of the repairs and when the center will reopen." On August 2, 2016, having received no response to his email, Yost sent emailed Haraz, requesting a status update on the closure and a projected reopening date. He also cast doubt on the need for the closure, noting reports that the clean-up and repairs had been completed, stating:

> [y]ou have failed to respond to my July 28 email regarding the closure of SDCC. The Guild requested a status update with details of the issue(s) and a projected reopening time. Unit work has been withheld from SDCC employees since July 23 with no explanation

> apart from repairs and inspections being underway due to a leak that occurred 11 days ago.
>
> Some who have needed to retrieve belongings from the suite report that it appears fully operable. There are no hazard warning signs posted on doors that enter the suite. Statements made by building maintenance staff reveal the clean up and repairs have been complete and the suite became operable last week. Air quality is reported to be fine.
>
> Again, please provide a status update with details of the issue(s) and a projected reopening time.

(GC Exh. 60; Tr. 2692–2696)

The following day, Yost filed a request for a step-one grievance meeting regarding the center's closure and requested the following documents:

1. A detailed account of the underlying reason for which SDCC has been closed;
2. A detailed account of the Employer's actions in response to the water damage, including cleanup, restoration, and safety tests;
3. Findings, and test results regarding the health and safety concerns cited;
4. Any and all notes and reports of Purple Communications and all personnel, and contractors involved in the restoration and the decision to determine the operability of SDCC; and
5. A projected date of reopening SDCC.

Yost explained that he requested this information because unit employees had reported to him that they had been into the center that it appeared operable and they were concerned about missing work. While the center was still closed, Yost and Haraz spoke by telephone, and Haraz asked him, "what makes you think you have the right to know this information?" to which he responded that, if Respondent had decided to keep the center closed to save money, this would amount to a lock out and violate the parties' CBA. According to Yost, the conversation ended "abruptly"; it is undisputed that Respondent never responded to Yost's his requests. (Tr. 1662, 2692–2696; Jt. Exh. 97)

b. Analysis

Yost's information request clearly sought relevant information. First, to the extent he requested information regarding the center's status as a safe workplace, such information is presumptively relevant. *Detroit Newspaper Agency*, 317 NLRB 1071, 1077 (1995) ("'[f]ew matters can be of greater legitimate concern to individuals in the workplace, and thus to the bargaining agent representing them, than exposure to conditions potentially threatening their health, well-being, or their very lives'") (citing *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29 (1982)). Moreover, Yost legitimately sought information that would enable him to determine

whether Respondent was violating the contract's no-lockout clause by using the water leak as a pretext to keep the center closed after it was repaired and fully operational. He based this not on pure speculation, but rather reports from VIs that they had witnessed the center in that condition. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994) (relevance shown where requesting party demonstrates reasonable belief, supported by objective evidence, which may include hearsay reports, that requested information is relevant) (citations omitted).

Respondent does not dispute the relevance of the requested information, but instead argues that the Union waived its right to the information by agreeing to the CBA's management-rights clause. I cannot agree. It is true that the management-rights clause reserves to Respondent the right to "manage and control its departments, buildings, facilities, equipment and operations," as well as to "discontinue work for business, economic, or operational reasons." However, based on reports from VIs, Yost suspected that Respondent—during the 2-week shut down—was in fact discontinuing work for more nefarious reasons outside the scope of this clause and in violation of the contract's no-lockout provision. A requesting union is entitled to "data requested in order to properly administer and police a collective-bargaining agreement." *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983); see also *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310 (8th Cir. 1979). Based on the contractual language, I do not find that the Union, by agreeing to the management-rights clause, waived its right to seek information to determine whether Respondent had taken an unlawful action outside the scope of that very clause.

Accordingly, I find that Respondent, by failing to provide the requested information regarding the closure of the San Diego call center during the summer of 2016, violated Section 8(a)(5) as alleged.

5. Request for Brooks' discipline information [¶ 7(p)]

The General Counsel alleges that, since July 6, 2016, Respondent failed to provide certain requested information regarding a discipline issued to VI Margie Brooks (Brooks), and additionally delayed in providing other, similarly requested information.

a. Facts

On July 6, 2016, Yost, by email, sent Stambaugh notice of a step-two grievance over a final warning issued to Brooks for customer complaints. As was his practice, Yost attached a request for information related to the discipline, noting that the information was necessary in order for the Union to assess the matter in the grievance context. The requested information included Brooks' personnel file, past commendations and discipline issued to her, comparator discipline issued to other VIs for customer complaints (including VIs in non-union call centers).[79] He also requested copies of all complaints lodged by the customer whose complaint led to Brooks' discipline "in order to ascertain potential patterns of the complainant (chronic complainer, nature of complaints, etcetera)." Finally, he requested that Respondent provide the Union with "verification" that the computer hardware and software Brooks had used were "free of technical

[79] The text of the information request is set forth in Appendix A to this decision.

abnormalities." Yost requested that the information be provided by July 15, 2016. (Jt. Exh. 83; Tr. 2681)

On July 8, 2016, Haraz informed Yost that she would provide the information no later than July 22, but she did not. Haraz credibly testified that she did attempt to send Yost responsive information on the day in question, but used an incorrect email address that had been saved by her email program; this was reflected by the documentary evidence. After Respondent's legal counsel notified her of her error, she forwarded Yost her misdirected, original response and apologized for the mistake on November 2, 2016. Her attachments included documents responsive to the first three of Yost's requests.[80] In response to the request for Brooks' commendations, Haraz referred Yost to these same documents, which do include notations regarding various commendations Brooks received from customers, but no actual commendations. With respect to the request for any additional complaints filed by the customer who had complained about Brooks, Haraz stated that Respondent had a policy against divulging the names of its customers. (Tr. 1644–1646, 2682–2684; Jt. Exh. 88, 89)

With respect to requests for comparator documents (items 7 and 8 of the request), Haraz stated that Respondent had already provided the Union with copies of all past discipline for unit members and that:

> [s]hould the guild want the employer to provide copies of past disciplines at other Union represented centers, please provide the employer the following:
>
> - Name
> - VI number
> - Dates
> - Specifics of the disciplinary action

(Jt. Exh. 89) She also took issue with Yost's request for verification that Brooks' equipment was functioning normally, stating:

> The employer does not understand your request in #4. In your request, you stated "...free from abnormalities..." The employer is requesting that the guild provide the employer substantiation leading you to believe there is any such abnormalities [sic]. Please provide the following:
>
> - Define "abnormalities"
> - A list of where the union got information that there may be "abnormalities" in the [] technology
> - Any and all correspondence between the [Union] and its members

[80] I base this conclusion on the posture of the complaint, which alleges only delay with respect to these items.

- Documentation of dates, times and customer in which the "abnormalities" occurred.

Id. There is no evidence that Yost responded to her queries.

Because Respondent raises a confidentiality defense to certain of the information requested regarding Brooks' discipline, a discussion of its confidentiality policy and relevant regulatory authority is necessary. Respondent does maintain a handbook policy (the lawfulness of which is not at issue here) stating that employees are responsible for safeguarding confidential information about its customers. According to Stambaugh, "[c]ustomer information is very confidential"). (Jt. Exh. 24 at 27–28; Tr. 1832)

Respondent is also subject to a Federal Communications Commission (FCC) regulation that requires it to keep certain customer data confidential.[81] This regulation, which applies to "telecommunications relay services" such as Respondent, provides that, absent a lawful order, certain "customer profile data" may not be "sold, distributed, shared or revealed in any other way" by a "relay center or its employees." 47 CFR 64.604(c)(7). The rulemaking history of this regulation indicates that the FCC considered "the confidentiality of customer profile information [to be] of paramount importance" to users of telecommunications relay services, and that "unfettered access" to such information "would violate the reasonable privacy expectations" of those users.[82] Respondent also refers to certain privacy obligations provided under Section 222 of the Communications Act, which governs telecommunications carrier; however, Respondent has offered no evidence that it is a carrier subject to this Act, and I have found none. See 47 U.S.C. § 222(a) (imposing duty on every telecommunications carrier "to protect the confidentiality of proprietary information of, and relating to . . . customers").

b. Analysis

As Respondent offers various defenses to these information request allegations, I will examine them by category:

Disciplinary/personnel file documents (items 1–3, 6 of Exhibit A) The Board has repeatedly held that information related to the discipline of employees is presumptively relevant. *Security Walls, LLC*, 361 NLRB 348 (2014); *Lansing Automakers Federal Credit Union*, 355 NLRB 1345 (2010); *Dish Network Service Corp*., 339 NLRB 1126 (2003); *Grand Rapids Press*, 331 NLRB 296 (2000). Indeed, this is the very type of information that the Union might need to process and/or evaluate a grievance or to determine whether to proceed to arbitration. *PAE Aviation*, 366 NLRB No. 95, slip op. at 3 (sufficient relevance shown where information sought "bear[s] on the Union's preparation of a defense for the grievant…or its determination whether to continue to process the grievance") (citing *Holiday Inn on the Bay*, 317 NLRB 479, 481–482 (1995)); see also *NLRB v. Acme Industrial Co.*, 385 U.S. at 435–436 (employer has a duty to furnish information which necessary to enable union to evaluate intelligently grievances filed). Respondent does not argue otherwise, but instead claims that its delay in providing such

[81] See Feb. 13, 2017 Consent Decree in *Purple Communications, Inc. and CSDVRS, LLC*, 2017 FCC 17-10 (Federal Communications Commission).

[82] In re *Telecommunications Relay Services*, Report and Order and Further Notice of Proposed Rulemaking, 2000 WL 245346 (Federal Communications Commission).

documents (sought by items 1–3 of the request) was excusable, in that Haraz did (albeit unsuccessfully) attempt to send responsive information.

Absent evidence of justification, an unreasonable delay in providing requested information constitutes a violation of Section 8(a)(5) "'inasmuch "[a]s the Union was entitled to the information at the time it made its initial request, [and] it was [r]espondent's duty to furnish it as promptly as possible.'" *PAE Aviation*, 366 NLRB No. 95, slip op. at 3 (citing *Pennco, Inc.*, 212 NLRB 677, 678 (1974)); see also *Monmouth Care Center*, 354 NLRB 11, 41 (2009) (citations omitted), reaffirmed and incorporated by reference, 356 NLRB 152 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012) ("[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all"). As the Board recently reiterated, when evaluating whether a delay was reasonable,

> [t]he analysis is an objective one; it focuses not on whether the employer delayed in bad faith or in an attempt to avoid production, but on whether it supplied the requested information in a reasonable time.

Management & Training Corporation, 366 NLRB No. 134, slip op. at 3 (2018) (citing *Champion Home Builders Co.*, 350 NLRB 788, 788 fn. 7 (2007)). Here, the facts demonstrate that Haraz had a reasonable amount of time in which to amass the requested information (as she in fact did so), but negligently failed to send it to Yost's proper email address. That her mistake was made in good faith is of no consequence, and I find that, by her 3½ month delay in responding to these requests, Haraz violated the Act as alleged. See id. (three and one-half month delay in providing information not excused by "forgetfulness").

Turning to item 6 of the request, which sought copies of Brook's customer commendations, Respondent does not offer any explanation for its refusal to respond to this item. Such documents would have relevance as potential exculpatory evidence in support of Brook's customer complaint grievance; no issue of customer confidentiality having been raised by Respondent, I find that its nonproduction violated Section 8(a)(5).

Customer-related information (item 5 of Exhibit A). With respect to Yost's request for copies of other complaints filed by the individual on whose complaint Respondent relied in disciplining Brooks, such potential exculpatory information is clearly relevant and would undoubtedly have appeared so to Respondent under the circumstances. Respondent, however, argues that it was not obligated to provide copies of additional complaints because Haraz told the Union this information was confidential. I disagree.

Under Board law, a bargaining representative is entitled to the identity of, and contact information for, a customer who make complaints resulting in discharge or other discipline of an employee, unless the employer has demonstrated a need for confidentiality by showing that it promised the customer anonymity, or the customer had a reasonable expectation of privacy. *Resorts International Hotel*, 307 NLRB 1437 (1992); *Fairmont Hotel*, 304 NLRB No. 95, fn.3 (1991). If the employer establishes its claim of confidentiality, that claim must be balanced against the Union's need for the information; and the employer must also show that it met its obligation to come forward with an offer to accommodate the two competing interests.

Fairmont Hotel, supra; see also, *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Lenox Hill Hospital*, 362 NLRB No. 16, slip op. at 1 fn. 2 (2015).

In this case, the evidence indicates that Respondent's customers do have a reasonable expectation of privacy in information contained in what the FCC terms his or her "customer profile." However, Respondent failed to demonstrate that the contents of the complaint documents requested fell within this definition, and, in any event, failed to notify the Union of its regulatory rationale for nondisclosure, simply stating that it had a "policy" against disclosing customer information. Finally, Respondent never proposed any accommodation to any concern it claimed to have, such as redacting the information protected by FCC regulations. Under the circumstances, I cannot find that Respondent was excused from its duty to provide the requested information. I will, however, allow Respondent in a subsequent compliance proceeding to demonstrate the necessity of redacting certain information pursuant to 47 U.S.C. § 222(a) and/or 47 CFR 64.604(c)(7).

Comparative discipline (items 7 and 8 of Exhibit A) In preparing for a grievance, a union is entitled to information that will assist it in assessing the level of discipline imposed for comparable infractions. *PAE Aviation*, 366 NLRB No. 95, slip op. at 3. A union's attempt to determine whether there has been disparate treatment of employees renders information regarding comparative discipline relevant, even when it involves non-unit employees. *St. Francis Regional Med. Ctr.*, 363 NLRB No. 69, slip op. at 22 (2015) (citing *SBC California,* 344 NLRB 243, 246 (2005). In the context of Brooks' grievance, Yost sought documents—in the form of comparative discipline—that would disclose whether Respondent was consistently enforcing its standards for customer complaint discipline; as such, his request was relevant. See id. (request for comparative discipline relevant and necessary to union in representing its members).

Instead of providing these documents, Respondent countered that, pursuant to the CBA, it had already provided the Union copies of all discipline issued to unit employees. The Board, however, has rejected the argument that a union's alternate source of documents excuses their production in response to a relevant information request. See *Lansing Automakers Federal Credit Union*, 355 NLRB 1345, 1352 (2010) (absent special circumstances, "an employer may not refuse to furnish relevant information on the grounds that the union has an alternative source or method of obtaining the information"); *King Soopers, Inc.*, 344 NLRB at 844 (respondent's duty to provide requested information "not satisfied merely because the [u]nion might have been able to locate the document in its records"); *Illinois-American Water Co.*, 296 NLRB 715, 724–725 (1989) (rejecting employer's contention it was relieved from providing information it believed was in possession of union or available through union stewards or union records), enfd. 933 F.2d 1368 (7th Cir. 1991).

Respondent may in fact have provided the Union with copies of disciplinary notices as they were issued. This, however, does not mean that the Union must accept this to be the case, or to undertake the burdensome task of reviewing every discipline provided to determine whether it involved a customer complaint. Rather, the Union is entitled to an "accurate and authoritative" disclosure of what Respondent considers discipline for customer complaints for purposes of the grievance at hand. See *Kroger Co.*, 226 NLRB 512, 513–514 (1976) ("[a]bsent special circumstances, a union's right to information is not defeated merely because the union may

acquire the needed information through an independent course of investigation. The union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form"). As such, I find that the Union was entitled to the comparative discipline documents it requested.

Verification of lack of "technical abnormalities" (item 4 of Exhibit A). To the extent that the Union sought to have Respondent "verify" that the hardware and software Brooks used was free of "technical abnormalities," I find that this allegation fails. Under the circumstances, it was not evident on its face what form of "verification" the Union sought, and, despite Haraz' request for clarification, the Union failed to explain what it meant by the term, "technical abnormalities." Nor was it clear whether the Union was asking that Respondent attest to the system's current fitness or its condition at the time Brook received her customer complaint, another issue Haraz also unsuccessfully sought to clarify. Under the circumstances, I find that the Union failed to state its request with sufficient particularity, thereby excusing Respondent's compliance.

Based on the above, I shall recommend dismissal of this portion of the General Counsel's allegations.

6. Request for Sterling's discipline information [¶ 7(q)]

The General Counsel alleges that, since July 14, 2016, Respondent failed to provide certain information requested by the Union regarding a discipline issued to VI Ava Sterling (Sterling).

a. Facts

On July 14, 2016, Yost, by email, sent Stambaugh notice of a step-two grievance over a final warning issued to Sterling for having 13 customer complaints during the prior year. Again, he attached a request for information related to the discipline, noting that the information was necessary as part of its handling of Sterling's grievance, and also mentioning the Union's general concern about the increased instance customer complaint discipline. (Tr. 2678; Jt. Exh. 90) The requested information included documents relied on in issuing Sterling the discipline, copies of complaints lodged against her in the past year, and comparator discipline issued to other VIs for customer complaints (including VIs at Respondent's non-union centers). He also requested "documents reflecting any training given to the person or person who investigated the complaints that led to [Sterling's] discipline."[83]

On July 29, 2016, Stambaugh emailed Yost attaching a response drafted by Haraz. This response included what appears to be a log of complaints about Sterling during the previous year, but these documents identified the complaining customers identified only as "Customer A," "Customer B," etc. In this regard, Haraz referred to Respondent's "policy. . . . .not to divulge customer names regarding communications between our customers and clients." Respondent also failed to provide documents regarding the training given its investigators, stating that the Union was "requesting information privy to management," which was "outside the jurisdiction of the collective bargaining agreement." Nor did Respondent provide comparator documents,

[83] See Appendix A, attached hereto.

stating that this information was also beyond the Union's "jurisdiction" in that it was not "covered" by the parties' contract. (Jt. Exh. 90, 91; Tr. 2679)

On August 2, 2016, Yost responded. Dismissing Respondent's "jurisdictional" objections as "misplaced," he noted that the Union's purpose was to "rule out discrimination of an employee for engaging in union membership" and to ensure that discipline was "evenly handed." He further argued that Respondent's overbreath objection did not excuse it from disclosing the documents relied on in issuing the discipline. Following this email, Yost received no response. (Jt. Exh. 92; Tr. 2679–2680)

b. Analysis

The majority of Yost's requests regarding Sterling's discipline (personnel file, comparative discipline, etc.) echo those he made regarding the discipline issued to Brooks, and I therefore find them similarly relevant requests to which Respondent was obligated to respond. Likewise, to the extent that Yost made clear that he was concerned with a change in Respondent's practice in evaluating customer complaints, I also find that he was entitled to the management training materials he requested. Relevance having been shown for these requests, I find no merit to Haraz' "jurisdictional" arguments for withholding responsive documents.

The remaining issue is whether, considering Respondent's regulatory obligations regarding customer information, Haraz was entitled to respond to the Union's request for customer complaints by providing a summary with customer names redacted. As I have indicated, Respondent appears to have had a legitimate rationale for withholding certain customer information pursuant to federal requirements. This fact alone, however, does not excuse Haraz' conduct. As noted, once an employer has demonstrated a genuine confidentiality concern, it is required to bargain with the union for an accommodation. See *Lenox Hill Hospital*, 362 NLRB No. 16, slip op. at 1 fn. 2. Had Haraz fully informed Yost about Respondent's regulatory obligation and then proposed an accommodation, her actions may well have been lawful. But she instead unilaterally fashioned an accommodation that suited Respondent; this falls short of meeting Respondent's bargaining obligation, and I find that the Union is entitled to the information as requested.

Accordingly, I find that Respondent, by failing to provide the information requested on July 14, 2016, regarding a discipline issued to VI Sterling, violated Section 8(a)(5) as alleged. Again, I will allow Respondent in a subsequent compliance proceeding to demonstrate the necessity of redacting information pursuant to 47 U.S.C. § 222(a) and/or 47 CFR 64.604(c)(7).

7. Request for Wilson's discipline information [¶ 7(r)]

The General Counsel alleges that, since July 14, 2016, Respondent failed to provide certain requested information regarding a discipline issued to VI Wayne Wilson (Wilson).

a. Facts

On July 14, 2016, Yost, by email, sent Stambaugh notice of a step-two grievance over a written warning issued to Wilson based on customer complaints. In addition to arguing that the

warning was unwarranted, Yost stated that, "disciplining employees for customer complaints is a new policy or practice imposed after ratification of the collective bargaining agreement and without bargaining with the Guild." Again, he attached a request for information related to the discipline, noting that the information was necessary as part of its grievance handling. The requested information echoed that Yost had requested with respect to Sterling's discipline (see Appendix A), and it was met with an equivalent response by Haraz on August 26, 2016, in terms of documents and objections. On September 2, 2016, Yost responded in a manner similar to his prior rebuttal in support of the parallel Sterling requests, noting that the requested extra-unit information was "relevant in order to establish even handedness, company-wide, regarding discipline issued for customer complaints." He received no response. ((Tr. 1652–1654, 2672–2677; Jt. Exhs. 93, 94, 95; GC Exh. 58)

b. Analysis

As Yost's requests regarding Wilson's discipline, and Haraz' response thereto, are essentially identical to those regarding Sterling, my findings regarding relevance and Respondent's "jurisdictional" arguments and confidentiality defense are likewise the same.

Accordingly, I find that Respondent, by failing to provide the information requested by the Union on July 14, 2016 regarding a discipline issued to VI Wilson, violated Section 8(a)(5) as alleged. Once again, I will allow Respondent in a subsequent compliance proceeding to demonstrate the necessity of redacting information pursuant to 47 U.S.C. § 222(a) and/or 47 CFR 64.604(c)(7).

8. Request for Maschue's discipline information [¶ 7(w)]

The General Counsel alleges that, since about November 9, 2016, Respondent failed to provide documents Respondent relied upon in disciplining VI Maschue.

a. Facts

On November 9, 2016, VI-steward Caplette sent Stambaugh a request for information related to a discipline issued to Maschue. Among other things, she requested all documents relied upon by Maschue in deciding to discipline Maschue. Caplette requested that the information be provided by November 18, 2016. After obtaining two extensions of time from the Union, Haraz finally sent Respondent's response on December 29, 2016, indicating that responsive documents included its notes from the investigatory meeting regarding Maschue's discipline I have previously found to have involved an unlawful interrogation. With respect to those notes, Haraz stated as follows:

> Management and Human Resources notes are outside of the jurisdiction of the guild [Union]. Management and shop steward was present during these investigatory meetings.

At hearing, Haraz confirmed that management and human resources' notes of Maschue's investigatory meeting existed and reiterated her position that she was not obligated to provide

them, because the Union, having had a steward present at the meeting, was in possession of the information the notes contained. (GC Exh. 62–64; Tr. 1673)

b. Analysis

I have previously found each of Respondent's rationales for withholding responsive documents—its "jurisdictional" argument and claim that the Union already possesses the information—to lack merit. See *Lansing Automakers,* 355 NLRB 1345; *King Soopers, Inc.*, 344 NLRB 842; *Illinois-American Water Co.*, 296 NLRB 715. In this case, Respondent's attempt to shield from disclosure clearly relevant material—indeed, notes that I have found to support a finding that Haraz unlawfully denied Maschue the assistance of her *Weingarten* representative—reflects either complete ignorance of Respondent's bargaining obligation or an egregious disregard of the same.

Accordingly, I find that Respondent, by failing to provide the information requested by the Union on November 9, 2016, regarding a discipline issued to VI Maschue, violated Section 8(a)(5) as alleged.

CONCLUSIONS OF LAW

1. Respondent Purple Communications, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent CSDVRS, LLC d/b/a ZVRS is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent Purple Communications, Inc. and Respondent CSDVRS, LLC d/b/a ZVRS (collectively, Respondent) constitute a joint employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. Charging Party Pacific Media Workers Guild, Local 39521, The Newspaper Guild, Communications Workers of America, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

5. During the relevant time period, Respondent was signatory to a collective-bargaining agreement with the Union (the 2015 Agreement), which by its terms is effective from April 1, 2015 through March 31, 2017.

6. The Union is the exclusive collective-bargaining representative of the following units, each of which is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

(a) All full-time and flex staff Video Interpreters (VIs) employed by the Employer at its facility located at 4542 Ruffner Street, Suite 270, San Diego, California, but excluding all other employees, center assistants, confidential

employees, managers, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

(b) All full-time and flex staff Video Interpreters (VIs) employed by Respondent at its Denver, Colorado facility, but excluding all other employees, center assistants, confidential employees, managers, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

(c) All full-time and flex staff Video Interpreters employed by the Employer in Tempe, Arizona, but excluding all other employees, center assistants, confidential employees, managers, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

(d) All full-time and flex staff Video Interpreters (VIs) employed by the Employer at its facility located in Oakland, California, but excluding all other employees, center assistants, confidential employees, managers, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

7. At all times since at least December 7, 2012, the Union, based on Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the employees in the units described in ¶ 6(a) through (d), above (the unit employees).

8. Respondent has violated Section 8(a)(1) of the Act by:

(a) Maintaining an overly broad electronic communications policy that unlawfully interferes with employees' use of Respondent's email system for Section 7 purposes;

(b) Maintaining an overly broad confidentiality policy that prevents employees from discussing performance appraisals, salary increases and other employment records;

(c) Disparately applying its Internet, Intranet, Voicemail and Electronic Communication Policy to prohibit non-business e-mails relating to unionization, while permitting non-business e-mails that do not relate to unionization;

(d) Disparately applying its non-solicitation policy to ban employees from placing union materials in the break room of its Tempe call center;

(e) Maintaining overly broad and discriminatory rules prohibiting the following conduct by employee-stewards serving as *Weingarten* representatives:

(1) objecting to a question asked by management before the interviewed employee answers it; and

(2) offering exculpatory evidence before management questioning is complete.

(f) Informing employees that it would be futile for them to select the Union as their bargaining representative, by telling them that the 2015 Agreement offers substantially the same terms and benefits as its non-represented employees receive without having to pay dues.

(g) Promising employees benefits for the purpose of coercing them into rejecting the Union as their bargaining representative by telling them that they would be granted all terms and benefits contained in the 2015 Agreement;

(h) Promulgating an overly-broad and discriminatory directive prohibiting employee-stewards from using Respondent's e-mail system for communicating with employees in its call centers regarding the Union;

(i) Labeling employee disciplinary notices as "confidential";

(j) Threatening to investigate employees based on the Union's request for information regarding employee discipline;

(k) Threatening employees with unspecified reprisals for engaging in union or other protected activities;

(l) Interrogating employees about their union and other protected activities, and the union and other protected activities of others;

(m) Denying unit employees the presence and/or assistance of their union representative at an interview which the employee reasonably believes may result in disciplinary action, including by ordering the union representative in question to remain silent and/or refrain from interrupting;

(n) Creating the impression that employees' union and other protected conduct is under surveillance;

(o) Soliciting employees to report on the union activities of their coworkers; and

(p) Disparaging the Union in its role as the unit employees' collective-bargaining representative by suggesting that, by bargaining a collective-bargaining agreement for them, the Union had "done nothing."

9. Respondent has violated Section 8(a)(1) and Section 8(a)(3) of the Act by:

(a) Directing employees to remove union-provided food, and pro-union displays and decorations from the work place;

(b) Removing union flyers from the tables in the break room of its Tempe call center; and

(c) Removing union-provided food from the break room of its San Diego call center;

10. Respondent has violated Section 8(a)(5) and (1) of the Act by:

(a) In March 2016, unilaterally changing the terms and conditions of employment of unit employees by ceasing to pay unit employees who were hired before August 2010 a differential for community interpreting work after they converted from full-time to "flex" status, without giving the Union notice and the opportunity to bargain over this change;

(b) In about May 2016, failing to continue in effect all the terms and conditions of the 2015 Agreement by ceasing to deduct dues from the earnings of unit employees attributable to the performance of community interpreting work without the Union's consent.

(c) Failing to provide the following necessary and relevant information requested by the Union for the performance of collective bargaining duties:

(1) information identified in complaint ¶ 7(n) regarding dual rates earned by unit employees;

(2) information identified in complaint ¶ 7(t) regarding the temporary closure of the San Diego call center during the summer of 2016;

(3) information regarding discipline issued to Margie Brooks, as identified in complaint ¶ 7(p)(5) through (8);

(4) information regarding discipline issued to Ava Sterling, as identified in complaint ¶ 7(q); and

(5) information regarding discipline issued to Nora Maschue, as identified in complaint ¶ 7(w).

(d) Unreasonably delaying in providing information regarding discipline issued to Margie Brooks, as identified in complaint ¶ 7(p)(1) through (3), which information was necessary and relevant information requested by the Union for the performance of collective bargaining duties.

11. Respondent violated Section 8(a)(5), (3) and (1) of the Act by:

(a) Promulgating and maintaining the following overly broad and discriminatory rules prohibiting the following employee conduct without giving the Union notice and the opportunity to bargain over the same:

(1) using break rooms for pro-union activities and/or placing union literature in break rooms (other than on designated union bulletin boards);

(2) conducting union business on "work place property";

(3) engaging in union conduct, including placing union-provided food, displays or other items in break rooms without prior authorization by management;

(4) displaying balloons and other pro-union paraphernalia in work areas;

(5) bringing in "treats or other efforts" for coworkers;

(6) soliciting in work areas, other than the display of personal effects;

(7) displaying small symbols of union loyalty, except in designated areas; and

(8) displaying larger symbols and displays of Union loyalty in any areas;

(b) Promulgating and maintaining an overly broad and discriminatory rule requiring employee-stewards to remove union announcements from tables in the break room at its Tempe call center, without giving the Union notice and the opportunity to bargain over the same; and

(c) Promulgating and maintaining the following overly broad and discriminatory rules prohibiting the following conduct by employee-stewards serving as *Weingarten* representatives, without giving the Union notice and the opportunity to bargain over the same:

(1) interrupting during the meeting;
(2) providing information to justify the interviewed employee's conduct prior to the end of questioning by management representative(s);
(3) engaging in combative behavior, standing, using intimidating body language or making sarcastic or snide comments; and
(4) meeting with interviewed employee on the VRS floor.

12. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

13. The allegation that set forth in ¶ 8(b) of the complaint that, in or around February 2016, Respondent failed to continue in effect all the terms and conditions of the 2015 Agreement, by ceasing the practice of giving full-time Unit employees scheduling preference over flex-time video interpreters, is deferred the parties' contractual grievance-arbitration procedure.

14. The Respondent did not violate the Act as further alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom, to take certain affirmative action designed to effectuate the policies of the Act, and to post a notice to employees to that effect.

Having found certain of Respondent's handbook rules to be overly broad and unlawful, I recommend that the Respondent be required to revise or rescind the unlawful rules, notify employees of the rescissions, and republish its handbook without the unlawful rules.

Having found that Respondent failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the unit employees by unilaterally changing the terms and conditions of employment of unit employees by ceasing to pay unit employees who were hired before August 2010 a differential for community interpreting work after they converted from full-time to "flex" status without giving the Union notice and the opportunity to bargain over this change, I recommend that Respondent be ordered to rescind its change to the rate of pay for community interpreting work performed by unit members hired before 2010 who changed their work status from full-time to "flex" following the parties' execution of an initial collective-bargaining agreement in April 2015. In this regard, Respondent should be ordered to make employees whole for any losses of earnings or other benefits suffered as a result of this violation,

including contractual wages and benefits in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. I also recommend that Respondent be ordered to compensate unit employees for any adverse tax consequences of receiving any lump-sum backpay awards and to file a report with the Social Security Administration allocating such backpay to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, supra.

Having found that Respondent failing and refusing to continue in effect all of the terms and conditions of the parties' collective-bargaining agreement by ceasing the deduction of union dues and fees from certain community interpreting earnings of unit employees who authorized such deductions and ceasing the remittance of those union dues and fees to the Union, I recommend that Respondent be ordered to (a) rescind any modification made to the 2015 Agreement affecting dues withholding for unit employees, and (b) make the Union whole for any dues it would have received since May 1, 2016 but for Respondent's unlawful cessation, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra, and without recouping the money owed for past dues from employees.[84]

Having found that Respondent failed and refused to provide the Union with information it requested on various dates as detailed above, it should be ordered to promptly supply said information. Specifically, I shall recommend that the Respondent be required to provide any of the information that I have found to have been unlawfully withheld as set forth in paragraphs 7(n), 7(s), 7(t), 7(p)(5) through (8), 7(q) and 7(w) of the complaint. As my findings reflect, in some instances a portion of the information encompassed in some of those paragraphs has been provided. Information that has been provided need not be re-provided.

Respondent shall post appropriate informational notices and an explanation of rights,[85] as described in the attached appendix. These documents shall be posted at Respondent's facilities wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices and an explanation of rights, these documents shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. In the event that during the pendency of these proceedings Respondent has gone out of business or closed the facility involved in these

[84] As the Board explained in *West Coast Cintas Corp.*, 291 NLRB 152, 156 fn. 6 (1988), Respondent must bear sole financial responsibility for the dues amounts it failed to collect. See also *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 5 fn. 12 (2015). To prevent a double recovery by the Union, however, payment by Respondent to the Union under this remedy should be offset by the amount of dues *actually collected* by the Union from members who authorized dues check-off since May 1, 2016, notwithstanding Respondent's failure to remit such amounts to the Union. See *A.W. Farrell & Son*, 361 NLRB No. 162, slip op. at 1 fn. 3 (2014).

[85] While I decline to recommend a notice-reading remedy in this case, I am sufficiently concerned that Respondent's unit employees have been subjected to a pervasive assault on their rights under the Act, including unlawful conduct tending to undermine the Union as the unit employees' selected bargaining representative, sufficient to warrant such a remedy. See *Pacific Beach Hotel*, 361 NLRB 709, 714 (2014) (ordering posting of explanation of rights setting out employees' core rights under the Act, coupled with "clear general examples that are specifically relevant to the unfair labor practices found").

proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 6, 2014. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 28 of the Board what action it will take with respect to this decision.

The General Counsel also seeks an order requiring that the attached notice be read to employees during working time by a high-ranking management official at the facility or by an agent of the Board. The reading aloud of a notice is an "extraordinary" remedy ordered in egregious circumstances where the Board's traditional notice remedies are deemed insufficient. *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005). Such is the case where the respondent is a recidivist violator of the Act, where unfair labor practices are multiple and pervasive, or when circumstances exist that suggest employees will not understand or will not be appropriately informed by a notice posting. While I do not suggest that the unfair labor practices committed by Respondent were not serious, they did not involve unlawful discharge or other discipline, withdrawal of recognition or other egregious acts constituting a broad attack on employee rights. I note that, while Respondent is technically a "recidivist" with respect to its unlawful email policy, its underlying violation in *Purple I* was based on reliance on then-established Board law the Board overturned in that case. See *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). While Respondent, by continuing to maintain and apply its unlawful handbook rule, failed to adhere to the Board's order in *Purple I*, I do not believe that a notice-reading remedy would meaningfully address this violation to any greater extent than the traditional notice posting I have outlined above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[86]

ORDER

A. Respondents Purple Communications, Inc. (Purple) and CSDVRS, LLC (CSDVRS) (collectively, Respondent), their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad electronic communications policy that unlawfully interferes with employees' use of its email system for Section 7 purposes;

(b) Maintaining an overly broad confidentiality policy that prevents employees from discussing performance appraisals, salary increases and other employment records;

(c) Disparately applying its Internet, Intranet, Voicemail and Electronic Communication Policy to prohibit non-business e-mails relating to unionization, while permitting non-business e-mails that do not relate to unionization;

[86] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Disparately applying its non-solicitation policy to ban employees from placing union materials in the break room of its Tempe call center;

(e) Maintaining overly broad and discriminatory rules prohibiting the following conduct by employee-stewards serving as *Weingarten* representatives:

(1) objecting to a question asked by management before the interviewed employee answers it; and

(2) offering exculpatory evidence before management questioning is complete.

(f) Informing employees that it would be futile for them to select the Pacific Media Workers Guild, the Newspaper Guild-Communication Workers of America, Local 39521 (the Union) as their bargaining representative, by telling them that the 2015 Agreement offers substantially the same terms and benefits as its non-represented employees receive without having to pay dues.

(g) Promising employees benefits for the purpose of coercing them into rejecting the Union as their bargaining representative by telling them that they would be granted all terms and benefits contained in the 2015 Agreement;

(h) Promulgating an overly-broad and discriminatory directive prohibiting employee-stewards from using Respondent's e-mail system for communicating with employees in its call centers regarding the Union;

(i) Labeling employee disciplinary notices as "confidential";

(j) Threatening to investigate employees based on the Union's request for information regarding employee discipline;

(k) Threatening employees with unspecified reprisals for engaging in union or other protected activities;

(l) Interrogating employees about their union and other protected activities, and the union and other protected activities of others;

(m) Denying employees the presence and/or assistance of their union representative at an interview which the employee reasonably believes may result in disciplinary action, including by ordering the union representative in question to remain silent and/or refrain from interrupting;

(n) Creating the impression that employees' union and other protected conduct is under surveillance;

(o) Soliciting employees to report on the union activities of their coworkers;

(p) Disparaging the Union in its role as the unit employees' collective-bargaining representative by suggesting that, by bargaining a collective-bargaining agreement for them, the Union had "done nothing";

(q) Directing employees to remove union-provided food, and pro-union displays and decorations from the work place;

(r) Removing union flyers and/or union-provided food from employee break rooms;

(s) Unilaterally changing the terms and conditions of employment of unit employees by changing the rate of pay for community interpreting work performed by unit employees hired before 2010 who converted from full-time to "flex" status without giving the Union notice and the opportunity to bargain over this change;

(t) Ceasing dues deduction from the earnings of unit employees attributable to the performance of community interpreting work without giving the Union notice and the opportunity to bargain over this change;

(u) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to its performance of its functions as the collective-bargaining representative of Respondent's unit employees regarding wages, hours, and other terms and conditions of employment, or unreasonably delay in furnishing such information;

(v) Promulgating and maintaining the following overly broad and discriminatory rules prohibiting the following employee conduct without giving the Union notice and the opportunity to bargain over the same:

(1) using break rooms for pro-union activities and/or placing union literature in break rooms (other than on designated union bulletin boards);
(2) conducting union business on "work place property";
(3) engaging in union conduct, including placing union-provided food, displays or other items in break rooms without prior authorization by management;
(4) displaying balloons and other pro-union paraphernalia in work areas;
(5) bringing in "treats or other efforts" for coworkers;
(6) soliciting in work areas, other than the display of personal effects;
(7) displaying small symbols of union loyalty, except in designated areas; and
(8) displaying larger symbols and displays of union loyalty in any areas;

(w) Promulgating and maintaining an overly broad and discriminatory rule requiring employee-stewards to remove union announcements from tables in the break room at its Tempe call center, without giving the Union notice and the opportunity to bargain over the same;

(x) Promulgating and maintaining the following overly broad and discriminatory rules prohibiting the following conduct by employee-stewards serving as *Weingarten* representatives, without giving the Union notice and the opportunity to bargain over the same:

(1) interrupting during the meeting;

(2) providing information to justify the interviewed employee's conduct prior to the end of questioning by management representative(s);

(3) engaging in combative behavior, standing, using of intimidating body language, or making sarcastic or snide comments; and

(4) meeting with the interviewed employee on the VRS floor;

(y) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Rescind the overly broad Internet, Intranet, Voicemail and Electronic Communication Policy and Employment Records policies in its employee handbook;

(b) With respect to each of the Internet, Intranet, Voicemail and Electronic Communication Policy and the Employment Records policy, furnish employees with an insert for the current employee handbook that (1) advises that the policy has been rescinded, or (2) provides a lawfully worded policy in its place on adhesive backing that will cover the unlawful policy; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful policy, or (2) provide a lawfully worded policy.

(c) Rescind any modification made to the 2015 Agreement affecting dues withholding for unit employees;

(d) Make the Union whole for any dues it would have received since May 1, 2016 but for Respondent's unlawful cessation of dues attributable to wages earned from community interpreting work, with interest as described in the remedy section, supra without recouping the money owed for past dues from employees

(e) Upon request of the Union, rescind the unlawful change to the rate of pay for community interpreting work performed by unit employees hired before 2010 who changed their work status from full-time to "flex" after the parties execution of their initial collective bargaining agreement on April 1, 2015;

(f) Make employees affected by the foregoing unlawful change whole for any losses of earnings or other benefits suffered as a result of this violation, including contractual wages and benefits, with interest as set forth in the remedy section of this decision;

(g) Compensate all affected employees for any adverse tax consequences of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating such backpay to the appropriate calendar quarters.

(h) Before implementing any future changes in wages, hours, or other terms and conditions of employment affecting unit employees, notify and, on request, bargain collectively and in good faith with the Union as their exclusive representative of employees, except as permitted by the collective-bargaining agreement;

(i) Provide the Union with the documents identified in ¶ 7(n), ¶ 7(p)(5) through (8), ¶ 7(q), ¶ 7(s) and ¶ 7(w) of the complaint.

(j) Within 14 days after service by the Region, post at its facilities nationwide copies of the attached notice marked "Appendix B" and post at its Denver, Colorado, Tempe, Arizona, San Diego, California and Oakland, California facilities copies of the attached notice marked "Appendix C" and the attached explanation of rights marked "Appendix D."[87] Copies of the notices and explanation of rights, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices and explanation or rights shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the relevant notice and, in the case of Respondent's Denver, Colorado, Tempe, Arizona, San Diego, California and Oakland, California facilities, the explanation of rights to all current employees and former employees employed by the Respondent at said closed facility or business at any time since October 6, 2014.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[87] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

5

Dated: Washington, D.C. August 3, 2018

Mara-Louise Anzalone
Administrative Law Judge

APPENDIX A[88]

BROOKS 7/6/2016 INFORMATION REQUEST [¶ 7(p); Jt. Exh. 83]

1. A copy of Ms. Brooks' personnel file;
2. Copies of any and all Employer communications regarding the underlying issue for which Ms. Brooks received the [June 27, 2016] discipline, including management notes regarding observations and review of Ms. Brooks' interpreting skills and professional conduct during customer interface;
3. Copies of any and all reports that substantiate the allegations of repeated disconnects;
4. Verification that the Ares/Orion software technology and hardware technology provided to Ms. Brooks to process calls are free of technical abnormalities;
5. Copies of all complaints lodged by the customer who complained against Ms. Brooks in order to ascertain potential patterns of the complainant (chronic complainer, nature of complaints, etcetera);
6. Copies of any and all past customer commendations of Ms. Brooks' customer service and interpreting skills;
7. Copies of past discipline issued at SDCC for customer complaints; and
8. Copies of past discipline issued (minus identifiable information) including dates, at all other centers for customer complaints.

STERLING 7/14/2016 INFORMATION REQUEST [¶ 7(q); Jt. Exh. 90]

1. All documents relied on in deciding to discipline Sterling;
6. Documents reflecting any training given to the person or persons who investigated the complaints that led to Sterling's discipline;
14. Copies of all complaints lodged by those customers who complained against Sterling during the last 12 months;
16. Copies of customer complaints for all VIs, enterprise wide, for the last 12 months; and
17. For each of the customer complaints identified in response to Item 16, copies of the discipline issued to employees for the customer complaints received during the last 12 months.

WILSON 7/14/2016 INFORMATION REQUEST [¶ 7(r); Jt. Exh. 94]

1. All documents on Respondent relied on in deciding to discipline Wilson;
6. Documents reflecting any training given to the person or persons who investigated the complaints that led to the discipline of Mr. Wilson;
14. Copies of all complaints lodged by those customers who complained against Mr. Wilson during the last 12 months;
16. Copies of customer complaints for all VIs, enterprise wide, for the last 12 months; and
17. For each of the customer complaints identified in response to Item 16, copies of the discipline issued to employees for the customer complaints received during the last 12 months.

[88] For ease of reference, the numbering of individual requests herein refers to that of the respective underlying information request.

APPENDIX B

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain, in our Employee Handbook, or anywhere else, the following rules that you would reasonably understand to prohibit you from exercising the above rights:

> EMPLOYMENT RECORDS
>
> Purple maintains a personnel file for each employee. The file includes confidential information such as your job application, resume, documentation of performance appraisals and salary increases, and other employment records. You have a right to inspect certain documents in your personnel file, as provided by law, in the presence of a Human Resources representative at a mutually convenient time. No copies of documents in your file may be made, with the exception of documents that you have previously signed. You may add your comments to any disputed item in the file.
>
> INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY
>
> Prohibited activities
> Employees are strictly prohibited from using the […] email systems […] in connection with any of the following activities:
>
> 2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
>
> 5. Sending uninvited email of a personal nature.
>
> 9. Distributing or storing […] solicitations […] or other non- business material or activities.

WE WILL NOT promise you that you will receive all the benefits obtained by the Union in its collective-bargaining agreement covering employees at our unionized facilities.

WE WILL NOT tell you that it would be futile for you to select the Union as your bargaining representative, including by announcing that we reached an agreement with the Union for a contract that offers substantially the same as what employees in non-unionized centers currently receive without having to pay dues.

WE WILL NOT label our Disciplinary Action Reports "Confidential."

WE WILL NOT in any other manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the overly-broad and discriminatory rules and directives listed above.

WE WILL rescind the unlawful provisions, policies, and rules set forth above from our Employee Handbooks and Disciplinary Action Report forms.

WE WILL furnish you with inserts for the current Employee Handbook that advise that the unlawful provisions have been rescinded; or **WE WILL** publish and distribute revised Employee Handbooks that do not contain the unlawful provisions.

WE WILL distribute to supervisors and managers at all of our facilities revised Disciplinary Action Report forms that are not labeled "Confidential" and will begin using those revised forms when it is necessary to issue discipline to employees.

WE WILL, within 14 days of the Board's Order, notify all employees to whom we issued Disciplinary Action Reports labeled "Confidential," that they are not required to keep their Disciplinary Action Reports confidential and may freely discuss them with other employees, labor organizations, and government agencies, if they wish to do so.

PURPLE COMMUNICATIONS, INC.
and its Successor and Joint Employer CSDVRS,
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-179794 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-416-4755.

APPENDIX C

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain, in our Employee Handbook, or anywhere else, the following rules that you would reasonably understand to prohibit you from exercising the above rights:

> EMPLOYMENT RECORDS
>
> Purple maintains a personnel file for each employee. The file includes confidential information such as your job application, resume, documentation of performance appraisals and salary increases, and other employment records. You have a right to inspect certain documents in your personnel file, as provided by law, in the presence of a Human Resources representative at a mutually convenient time. No copies of documents in your file may be made, with the exception of documents that you have previously signed. You may add your comments to any disputed item in the file.
>
> INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY
>
> Prohibited activities
> Employees are strictly prohibited from using the […] email systems […] in connection with any of the following activities:
>
> 2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
>
> 5. Sending uninvited email of a personal nature.
>
> 9. Distributing or storing […] solicitations […] or other non- business material or activities.

PACIFIC MEDIA WORKERS GUILD, THE NEWSPAPER GUILD—COMMUNICATION WORKERS OF AMERICA, LOCAL 39521 (the Union) is the employees' representative in dealing with us regarding wages, hours and other working conditions of the employees in the following units (the unit employees):

> All full-time and flex staff Video Interpreters (VIs) employed by Respondents at their Denver, Colorado facility, but excluding all other employees, center assistants, confidential employees, managers, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.
>
> All full-time and flex staff Video Interpreters employed by Respondents in Tempe, Arizona, but excluding all other employees, center assistants, confidential employees, managers, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.
>
> All full-time and flex staff Video Interpreters (VIs) employed by Respondents at their facility located in Oakland, California, but excluding all other employees, center assistants, confidential employees, managers, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

WE WILL NOT selectively and disparately enforce the above rule about NON-SOLICITATION AND NON-DISTRIBUTION OF LITERATURE by prohibiting employees from leaving materials related to the Union in the break room, while permitting employees to leave materials not related the Union in the break room.

WE WILL NOT selectively and disparately enforce the above INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY by using it to prohibit employees from engaging in activities to join, support, or assist the Union, while permitting employees to use those systems and equipment for other non-business activities.

WE WILL NOT announce and maintain an overly-broad and discriminatory rule or directive prohibiting employee-stewards from using our e-mail system for communicating with employees in our call centers regarding the Union.

WE WILL NOT label our Disciplinary Action Reports "Confidential."

WE WILL NOT threaten you with negative consequences of any kind because of your union activities, the union activities of other employees, or the Union's performance of its role as your collective-bargaining representative, including by threatening to investigate employees involved in teaming reports, in response to the Union's request for information as part of a grievance investigation.

WE WILL NOT ask you about your union support or activities or the union support or activities of other employees.

WE WILL NOT watch you to discover your union activities or make it appear that we are doing so.

WE WILL NOT promise you benefits, including future promotional opportunities if you engage in surveillance of employees' Union activities.

WE WILL NOT disparage the Union, including by telling you that it has not done anything for you.

WE WILL NOT tell you that your support for the Union is futile, because the collective-bargaining agreement it bargained for them had "done nothing" for you.

WE WILL NOT tell our non-represented employees that it would be futile for them to select the Union as their bargaining representative, including by announcing we reached an agreement with the Union for a contract that offers substantially the same as what our non-represented employees currently receive without having to pay dues.

WE WILL NOT promise non-represented employees that they will receive all the benefits obtained by the Union in its collective-bargaining agreements covering unit employees.

WE WILL NOT deny your request to be represented by a Union representative of your choice during an interview you reasonably believe may result in discipline (an investigatory meeting), improperly restrict your selected Union representative's ability to provide assistance and counsel to you, including by requiring her or him to remain silent while you are questioned by management.

WE WILL NOT announce and maintain overly-broad and discriminatory rules or directives that improperly restrict your selected Union representative's ability to provide assistance and counsel to you in an investigatory meeting, including rules or directives that prohibit employee-stewards from:

- meeting with you on the VRS floor to prepare for an investigatory interview;
- objecting to clarify a question you are asked before you answer it;
- interrupting in a non-aggressive or adversarial manner while you are being questioned by management;
- elaborating, providing information or otherwise explaining your conduct while you are being questioned by management;
- standing or using "intimidating body language" during an investigatory interview; and
- making sarcastic or "snide" comments during an investigatory interview.

WE WILL NOT remove, or direct employees to remove, union-provided food, pro-union displays or pro-union decorations from employee break rooms;

WE WILL NOT direct employees to remove pro-union decorations from employee workstations;

WE WILL NOT announce and maintain overly-broad rules and discriminatory rules or directives that prohibit you from soliciting in work areas or displaying symbols of Union loyalty at work;

WE WILL NOT fail and refuse to recognize and bargain in good faith with the Union as the exclusive representative of employees in the Units.

WE WILL NOT fail to continue in effect all the terms and conditions of our collective- bargaining agreements with the Union, without the Union's consent, including by:

- ceasing to pay employees in the Units who were hired before August 2010 a differential for community interpreting work after they converted from full-time to flex-time status; and
- ceasing to deduct dues from pay earned by Unit employees for community interpreting work.

WE WILL NOT make changes to the wages, hours, and other terms and conditions of employment of unit employees, without notifying the Union or affording the Union an opportunity to bargain over this conduct and/or the effects of this conduct, including by requiring employee-stewards to remove union announcements from break-room tables' or by announcing and maintaining overly-broad and discriminatory rules and directives prohibiting you from:

- using break rooms for pro-union activities and/or placing union-related materials in break rooms (other than on designated union bulletin boards);
- conducting union business on "work place property";
- engaging in union conduct, including placing pro-union food, displays or other items in break rooms without prior authorization by management;
- displaying balloons and other pro-union paraphernalia in working areas; and
- meeting with your selected representative on the VRS floor to prepare for an investigatory interview;
- soliciting in work areas, other than the display of personal effects;
- displaying small symbols of union loyalty, except in designated areas; and
- displaying larger symbols and displays of union loyalty in any areas.

WE WILL NOT fail and refuse to provide, or unreasonably delaying in providing, the Union with requested information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective bargaining representative of the Units, or unreasonably delay in providing such information.

WE WILL NOT impose new rules or directives, including the overly-broad and discriminatory rules and directives listed above, because our employees formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

WE WILL NOT in any other manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the overly-broad and discriminatory rules and directives listed above.

WE WILL rescind the unlawful provisions, policies, and rules set forth above from our Employee Handbooks and Disciplinary Action Report forms.

WE WILL furnish you with inserts for the current Employee Handbook that advise that the unlawful provisions have been rescinded; or **WE WILL** publish and distribute revised Employee Handbooks that do not contain the unlawful provisions.

WE WILL distribute to supervisors and managers at all of our facilities revised Disciplinary Action Reports forms that are not labeled "Confidential" and will begin using those revised forms when it is necessary to issue discipline to employees.

WE WILL, within 14 days of the Board's Order, notify all employees to whom we issued Disciplinary Action Reports labeled "Confidential," that they are not required to keep their Disciplinary Action Reports confidential and may freely discuss them with other employees, labor organizations, and government agencies, if they wish to do so.

WE WILL permit employees to leave materials related to the Union in the break room at our facilities, in the same manner that we permit employees to leave materials unrelated to the Union in the break room at our facilities.

WE WILL recognize and bargain in good faith with the Union as the exclusive representative of employees in the Units.

WE WILL, within 14 days of the Board's Order, provide the Union with the documents and information it requested, including:

- names and rate amounts for unit employees paid a differential for performing community interpreting work;
- documents it requested regarding the closure of the San Diego call center in the Summer of 2016;
- documents it requested (about the following dates) relating to discipline issued to: Wayne Wilson (July 14, 2016), Ava Sterling (July 14, 2016), Nora Maschue (November 9, 2016);
- documents we have not already provided in response to the Union's request on about July 6, 2016 relating to the discipline of Margie Brooks.

WE WILL, upon request of the Union, resume paying employees in the Units who were hired before August 2010 a differential for community interpreting work after they converted from full-time to flex-time status, and **WE WILL** make any employee who lost pay as a result of our failure to pay such a differential, plus interest compounded daily, including through compensation for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, compensate any unit employee who receives backpay as a result of the foregoing unlawful change in terms and conditions of employment, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and **WE WILL** file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, upon request of the Union, resume deducting dues from pay earned by Unit employees for community interpreting work and **WE WILL** compensate the Union for the dues we failed to deduct from amounts paid to bargaining unit employees for time spent performing community interpreting work, at no cost to you.

PURPLE COMMUNICATIONS, INC.
and its Successor and Joint Employer CSDVRS,

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1400
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Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

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THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-416-4755.

APPENDIX D

EXPLANATION OF RIGHTS
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

Employees covered by the National Labor Relations Act have the right to join together to improve their wages and working conditions, including by organizing a union and bargaining collectively with their employer, and also the right to choose not to do so. This Explanation of Rights contains important information about your rights under this Federal law.

The National Labor Relations Board has ordered your employer, PURPLE COMMUNICATIONS, INC. and its Successor and Joint Employer CSDVRS, LLC d/b/a ZVRS, to provide you with this Explanation of Rights to describe your rights and to provide examples of illegal behavior.

Under the National Labor Relations Act, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and working conditions.
- Support your union in negotiations.
- Discuss your wages, benefits, other terms and conditions of employment, and collective-bargaining negotiations with your coworkers or your union.
- Take action with one or more coworkers to improve your working conditions.
- Choose not to do any of these activities.

It is illegal for your employer to:

- Threaten you with job loss or loss of pay or benefits, if you support a union or act in support of collective bargaining.
- Remove, or direct you to remove, union-provided food, pro-union displays or pro-union decorations from employee break rooms.
- Deny your request to be represented by a union representative of your choice during an interview you reasonably believe may result in discipline.
- Improperly restrict your selected union representative's ability to provide you with assistance and counsel in such a meeting.
- Make unilateral changes in your terms and conditions of employment (such as pay differentials and dues withholding) without first providing your union with notice of the proposed changes and affording the union an opportunity to bargain about the changes, except in certain situations.
- Impose new rules or directives because you formed, joined and assisted the union that represents you, or because you took action with one or more coworkers to improve your working conditions, or to discourage you from doing so.
- Warn, suspend, discharge, transfer or eliminate your work because you have supported the union or acted in support of collective bargaining. It is also illegal for your employer to threaten to do any of these things.
- Upon a request by the union, your employer is required to provide information to the union that it needs to do its job as your representative, including documents it requests in connection with a grievance over employee discipline.
- Your employer must honor any collective-bargaining agreement that it reaches with your union.
- Your employer cannot retaliate against you if you participate or assist your union in collective bargaining.

Illegal conduct will not be permitted. The National Labor Relations Board enforces the Act by prosecuting violations. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within 6 months of the unlawful activity. You may ask about a possible violation without your employer or anyone else being informed that you have done so. The NLRB will conduct an investigation of possible violations if a charge is filed. Charges maybe filed by any person and need not be filed by the employee directly affected by the violation.

You can contact the NLRB's regional office, located at:

2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-179794 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-416-4755.